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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 406

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

SIMPLICITY PATTERN CO., INC.

No. 447

SIMPLICITY PATTERN CO., INC., PETITIONER,

vs.

FEDERAL TRADE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 406—PETITION FOR CERTIORARI FILED SEPTEMBER 26, 1958

No. 447—PETITION FOR CERTIORARI FILED OCTOBER 12, 1958

CERTIORARI GRANTED NOVEMBER 24, 1958

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 406

FEDERAL TRADE COMMISSION, PETITIONER.

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SIMPLICITY PATTERN CO., INC.

No. 447

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FEDERAL TRADE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

No. 13,884

SIMPLICITY PATTERN Co., INC., a Corporation, Petitioner,

v.

FEDERAL TRADE COMMISSION, Respondent

Petition for Review of Order of the Federal Trade Commission

Joint Appendix—Filed September 11, 1957

[fol. 2] **BEFORE FEDERAL TRADE COMMISSION**

Docket No. 6221

**In the Matter of SIMPLICITY PATTERN COMPANY, INC., a
CORPORATION**

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Simplicity Pattern Company, Inc., a corporation hereinafter designated and referred to as "respondent", has violated the provisions of Section 5 of said Act (U.S.C. Title 15, Section 45) and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, and pursuant also to the provisions of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, (the Clayton Act) as amended by the Robinson-Patman Act,

approved June 19, 1936 (15 U.S.C., Sec. 13), the Federal Trade Commission having reason to believe that said respondent, Simplicity Pattern Company, Inc., a corporation, has violated Section 2(e) of said Act, the Commission hereby issues its complaint stating its charges in such respects, as follows:

Count I

Paragraph One: Respondent, Simplicity Pattern Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business at 200 Madison Avenue, New York, New York.

Paragraph Two: Respondent manufactures dress patterns for the use of women and girls in making their own [fol. 3] clothing. Respondent, while not the oldest, is the largest manufacturer of dress patterns in the United States. Its 1951 sales amounted to \$11,108,388.00, of which \$8,142,186.00 was for patterns alone.

Paragraph Three: Respondent owns and operates factories for the manufacture of patterns at Niles, Michigan, and Terre Haute, Indiana. In these factories respondent operates a paper mill, printing plant, engraving plant, bindery, cutting, and folding departments, as well as other manufacturing divisions required to produce the many millions of patterns which it sells. In addition to patterns, respondent publishes promotional material which is printed at its factories. These publications include the fashion magazine "Modern Miss" which is directed toward the youth market. It is devoted to the interests of fashion creation, sewing and kindred subjects containing illustrations of respondent's designs and patterns with appropriate numbers, and is delivered free to 40,000 registered home sewing teachers throughout the country. Respondent's aim, through this magazine, is to interest girls in all parts of the country in clothes that they can make themselves. Respondent publishes for the use of its dealers counter catalogs, which respondent issues monthly. These catalogs are necessary to the sale of patterns in a retail store. They contain illustrations of all patterns currently manufactured and sold by respondent and are kept in the store at a convenient place in the pattern department. Respondent also publishes for the use of its dealers fashion

previews, issued monthly, which are small catalogs containing illustrations only of the pattern fashions just introduced. The previews are given free by the dealer to customers so that they may be taken to the customer's home where new pattern illustrations may be examined at leisure. Respondent also publishes a fashion magazine and sewing book which its dealers may order. Respondent's patterns and dealer promotional material are shipped and transported from its factories to over 15 thousand merchants [fol. 4] and to respondent's warehouses located throughout the country.

Paragraph Four: In the course and conduct of its business, respondent transports its said patterns and dealer promotional material, or causes the same to be transported, from the state and place of their manufacture and/or the state and place where respondent maintains its warehouses, to its customers and purchasers thereof located in states other than the state of manufacture or warehouse storage of said products, and there is now, and has been for many years last past, a constant current of trade and commerce in said products between and among the various states of the United States, and in the District of Columbia.

Paragraph Five: Respondent's customers consist of department stores, small dry goods stores, yard goods shops, "Ten cent" stores and mail order houses. Respondent is a pioneer in the sale of dress patterns to the so-called "Ten cent" stores, and is the first manufacturer to induce them to enter this field.

Paragraph Six: Respondent sells its products to, or through, its various types of customers under written contracts with them; but except for the purchase prices of 60% of the labeled retail prices, which respondent charges to all its customers, respondent's contracts differ widely as to terms and conditions of sale. Such differences, with some exceptions, operate principally against the financial interests of respondent's smaller department stores, "Ten cent" stores, dry goods stores, and yard goods shops, and to the financial advantage of the larger "Ten cent" stores, department stores, chains and mail order houses.

For brevity, respondent's larger customers, namely, the "Ten cent" stores and mail order houses will hereinafter

be referred to as "larger customers" and the smaller "Ten cent" stores, department stores, dry goods stores, and yard goods shops will be referred to as "smaller customers."

[fol. 5] Paragraph Seven: The essential differences existing between respondent's contracts with its "larger customers" and "smaller customers" appear to be as follows:

(a) Some of respondent's "smaller customers" are required to pay their bills net within 10 days of the monthly billing from respondent or pay interest of 5% on the overdue balance. Respondent's "larger customers" are accorded the privilege of receiving respondent's patterns for retail sale under an arrangement with respondent known as "a standing debit" whereby payment for a substantial part, and sometimes all, of the cost of the customer's inventories of such patterns is deferred without interest until the end of the contract period. One of respondent's largest "Ten cent" store customers carried an unpaid-for average inventory of respondent's patterns without interest charges at a cost value in excess of \$800,000.

(b) Under respondent's "standing debit" policy, heretofore referred to under subparagraph (a) of this paragraph, which respondent extends to its "larger customers", all unpaid-for patterns in the customer's inventories are and remain the property of respondent. Under this arrangement respondent's larger customers, especially its larger "Ten cent" store and mail order house customers, are enabled to carry large inventories of respondent's patterns in their stores with little or no investment of their own. In January, 1951, one large chain of "Ten cent" stores had \$808,900 cost value of respondent's patterns in its inventories. At that time the investment of this chain in the inventory was \$235,000 and the remaining patterns were the property of respondent. This balance of \$235,000 was subsequently liquidated by respondent with the result that the particular chain referred to ultimately had no investment in its pattern inventories, the title to which reverted to respondent. Thus, inventories which were the property of respondent but which were placed in [fol. 6] the stores of this chain produced sales for the chain amounting to a million and three-quarter dollars in sales at retail with little or no investment by the chain. Payment for the patterns sold at retail was ultimately made

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to respondent by this customer according to the customer's "usual practice" of payment. No such arrangements were offered or extended to respondent's "smaller customers."

(c) Respondent's "smaller customers" are required to enter into 5 year contracts for the monthly purchase from respondent of new patterns as issued which contracts are to remain in force for the term of 5 years from the date of acceptance by respondent, and from term to term thereafter, unless terminated by either party by written notice served sixty days prior to the expiration of the initial or any succeeding term. In addition, many of respondent's contracts provide that the customer will not assign the contract or move the pattern stocks to other premises without respondent's written consent. The practical effect of respondent's said contracts is that respondent's "smaller dealers" are under obligation to order and pay for respondent's patterns for a term of 5 years. If they cease to buy respondent's patterns because of a desire to take on another line, because of going out of business, loss of lease, or from other cause, their pattern inventories become a loss to them. On the other hand, most of respondent's "larger customers" are favored with one year contracts renewable from year to year and terminable upon one year's written notice, which gives a more flexible basis of operation for the "larger customers." Some of respondent's contracts with its "larger customers" also provide that if any individual store terminates its textile department or discontinues business altogether, such store's pattern department may discontinue doing business with respondent at any time.

(d) Respondent favors many of its "larger customers" with contracts providing that upon termination of the agree-[fol. 7] ments all patterns in good salable condition remaining in the customer's inventories may be returned for credit. Such patterns are usually placed in such customer's stores on "Standing Debit", and remain the property of respondent until sold. Since respondent's "smaller customers" usually are required to pay for the patterns composing their inventories, they cannot return them to respondent on termination of their agreements. In many instances this results in the loss to such "smaller customers" of the investments made in their inventories of respondent's patterns.

(e) Respondent, in its contracts with its "smaller purchasers" requires them to purchase its monthly previews at a cost to the customer of \$3.75 per 300 per month (not imprinted) or at a cost of from \$6.50 per 500 to \$7.50 per 1,000 (in lots of 3,000 or more per month) imprinted with the name of the customer's store, thereby requiring its "smaller customers" to bear a substantial part of respondent's promotional costs. Respondent does not require its "larger customers" to purchase any previews at all. This is especially true with respect to respondent's larger "Ten cent" store customers who do not care to use previews in the sale of patterns. Respondent's largest "Ten cent" store chain customer, during each of the years 1950 and 1951, purchased approximately \$1,050,000 of respondent's patterns, which represents about 13% of respondent's total sales to all customers of \$8,142,186. This chain is not required by respondent to buy previews; and it buys none. Respondent annually sells about 10,800,000 previews to its "smaller customers," at a cost to them of about \$606,000 annually, or approximately 7½% of respondent's total sales. Had respondent required this chain to purchase its proportionate share of previews, the purchase of this promotional material by this chain would have amounted to \$78,750.

(f) Respondent prepays transportation charges on all shipments of respondent's merchandise to some of its [fol. 8] "larger customers"; to others respondent prepays transportation charges on all shipments with the exception of the initial stock purchased; to still others of respondent's "larger customers" respondent prepays transportation charges on all re-ordered patterns and requires the customer to pay such charges on the initial stock shipped and on the current monthly shipments of new patterns. On the other hand, respondent requires most of its "smaller customers" to pay transportation charges on all goods received from respondent.

Paragraph Eight. For a number of years last past respondent has been, and is now, in competition with other manufacturers in the sale of dress patterns in the United States and the District of Columbia. Respondent was incorporated and began business on December 19, 1927. Patterns had been, in the past, sold to the retail trade by de-

partment stores, dry goods stores, yard goods shops, and the like, until about twenty years ago, respondent pioneered the sale of patterns through a different type of purchaser, the chain "Ten cent" store. As instrumental in obtaining this business, respondent offered and gave to this type of store a special 6% discount (discontinued in 1946), together with the other concessions hereinbefore mentioned in Paragraph Seven (a) to (f), inclusive. In 1939 the industry as a whole sold 45 million patterns of which respondent sold 21 million and its competitors sold 24 million. In 1951 the total of the industry's sales was 82 million patterns, of which respondent sold 46 million. Respondent, therefore, by 1951 was selling 10 million more patterns annually than all of its competitors combined. Approximately thirty-four percent of respondent's pattern sales, or about \$2,768,280.00, are now made to the chain "Ten cent" stores and mail-order houses. Respondent controls this market and has virtually all of this business, and is likely to retain it unless the practices alleged in this complaint are terminated.

[Vol. 9] Paragraph Nine: Respondent's practice of originally allowing an additional 6% discount to its "larger customers," while discontinued in 1946, was initiated by respondent, together with the other practices alleged in Paragraph Seven (a) to (f), inclusive, as an inducement to persuade the chain "Ten cent" stores to engage in the selling of respondent's patterns which this type of store had not theretofore sold, and to retain this business in respondent in the future. By 1946 respondent felt that the granting of the 6% discount was no longer necessary to retain the "Ten cent" store business and the practice was then discontinued. The other discriminatory practices alleged in Paragraph Seven (a) to (f), inclusive, were, however, continued by respondent and are still in effect.

Respondent's acts and practices as herein alleged in Paragraph Seven (a) to (f), inclusive, unfairly make its "smaller customers" bear a disproportionate part of its cost of doing business and enable it to furnish its "larger customers" with the credit, return privileges, free transportation, and other above-described benefits not accorded its "smaller customers." The furnishing of these additional benefits contributed to and supported the above-

stated degree of control held by respondent over the business of "Ten cent" stores and mail-order houses. This has a dangerous tendency unduly to hinder competition. Competitors are unable to secure any of this business without furnishing comparable benefits. This, they are unable to do without also unfairly discriminating between their classes of customers.

Said acts and practices, therefore, are unfair methods of competition and are discriminatory in favor of respondent's "larger customers" and against respondent's "smaller customers"; tend to prevent its "smaller customers" from making a normal profit, and tend to, and do, restrict, divert, obstruct, foreclose and monopolize the free channels of trade and commerce to the substantial injury of respondent's competitors, both actual and potential, in the sale of dress patterns to the larger "Ten cent" stores, and other stores to whom respondent gives these above-described discriminatory terms and benefits.

Paragraph Ten: The aforesaid acts and practices of respondent as herein alleged are contrary to public policy because of their dangerous tendency unduly to hinder competition and create monopoly. Therefore, they constitute unfair acts and practices and unfair methods of competition in commerce within the meaning of the Federal Trade Commission Act.

Count II

Paragraph Eleven: Paragraphs One to Six, inclusive, of Count I hereof, are hereby repeated and made a part of this Count as fully and with the same forth and effect as though here again set forth in full:

Paragraph Twelve: Respondent sells its monthly counter catalogs to its "smaller customers" at a price of \$1.65 or \$2.00 each, depending upon whether the catalog has a soft or hard cover. Respondent's smallest customers are required to buy at least twelve of these catalogs annually; larger stores are required to buy more depending upon the size of their pattern departments and volume of customers. To many of respondent's "larger customers", principally respondent's larger "Ten cent" store customers, respondent furnishes the desired number of counter catalogs free of charge. Many of such "larger customers" who receive

the benefit of free catalogs from respondent are in competition in the retail sale of patterns with many of respondent's "smaller customers" who are required to buy them, as alleged.

Paragraph Thirteen: Respondent makes available to its customers pattern cabinets and other equipment, and stands for use in the storage and display of its patterns and promotional material including its catalogs and previews. Pattern cabinets are necessary to the proper storage and [fol. 11] ready access for sale of patterns; and the other equipment, such as catalogs and preview stands are essential to a proper display of this promotional material and its ready access to the retail customer.

Respondent sells to its "smaller customers" pattern cabinets and equipment upon the following terms, to wit:

Five-drawer floor cabinet, capacity 3,000 patterns, \$150 each.

Three-drawer floor cabinet; capacity 1,800 patterns, \$100 each.

Sectional cabinets, capacity 600 patterns, \$30 each:

Preview stands, \$15 each.

Catalogs stands, \$12 each.

Sewing book stands, \$1 each.

In some cases respondent rents the above mentioned cabinets and equipment to its "smaller customers."

Respondent does not require many of its "larger customers" to purchase or rent cabinets or equipment, but instead, the same are furnished without charge to such customers and are on "Standing Unpaid Balance" bearing no interest. They remain the property of respondent, and are returned to respondent when their use is no longer required.

Many of respondent's "smaller customers" who are required to purchase or rent pattern cabinets and equipment in order for the same to become available to them are in competition with many of respondent's "larger customers" who are furnished such cabinets and equipment by respondent without charge.

Paragraph Fourteen: In furnishing counter catalogs to its "smaller customers" and "larger customers" by respondent as herein alleged in Paragraph Twelve, and in furnishing pattern cabinets and equipment for the sale of

patterns to the said named classes of customers as alleged in Paragraph Thirteen, respondent has discriminated in favor of its "larger customers" and against its "smaller customers" by offering and furnishing to such "larger customers" said services and facilities connected with the [fol. 12] handling, sale and offering for sale of patterns purchased from respondent upon terms not accorded to its "smaller purchasers" on proportionally equal terms.

Paragraph Fifteen: The aforesaid acts and practices of respondent as herein alleged are in violation of Section 2(e) of the Clayton Act as amended by the Robinson Patman Act.

Wherefore, the premises considered, the Federal Trade Commission, on the 25th day of June, 1954, issues its complaint against said respondent.

Notice

Notice is hereby given you, Simplicity Pattern Company, Inc., a corporation, respondent herein, that the 8th day of September, A.D., 1954, at 10 o'clock is hereby fixed as the time and Federal Trade Commission Office, United States Court House, Foley Square, New York, New York, as the place when and where a hearing will be had before William L. Pack, a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. Such answer shall contain a concise statement of the facts which constitute the ground for defense and shall specifically admit or deny each of the facts alleged in the complaint unless you are without knowledge, in which case you shall so state. Failure to file an answer to or plead specifically to any allegation of the complaint, shall constitute an admission of such allegation.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent

[fol. 13] ent admits all the the material allegations of fact charged in the complaint to be true. Such answer will constitute a waiver of any hearing as to the facts alleged in the complaint and findings as to the facts and conclusions based upon such answer shall be made and order entered disposing of the matter without any intervening procedure. The respondent may, however, reserve in such answer the right to submit proposed findings and conclusions of fact or of law under Rule XXI, and the right to appeal under Rule XXII.

Failure to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission and Hearing Examiner William L. Pack, without further notice, to find the facts to be as alleged herein and to issue the following order in this proceeding:

It is ordered that the respondent Simplicity Pattern Company, Inc., a corporation, directly or indirectly through its officers, directors, agents, representatives or employees, or through any corporate or other device, or otherwise, in or in connection with, the offering for sale, sale or distribution of dress patterns, or promotional or other facilities or material used in connection with the resale thereof, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(a) Extending to some customers longer periods of time for payment without interest charges on unpaid balances owed while refusing to extend equally favorable terms of payment to other customers.

(b) Extending to some customers terms or arrangements for the sale of patterns in such customers' stores whereby said patterns are or remain the property of respondent, which denying such terms or arrangements to other customers.

(c) Requiring some customers to execute contracts for longer periods of time for the purchase of respondent's [fol. 14] patterns, containing no rights of assignment or removal of stocks to other premises, and providing for the termination of said contracts only upon the expiration of the initial or any succeeding term thereof, while extending to other customers shorter terms of contracts with no provisions against assignment or removal of stocks to other

premises and containing provisions for termination at any time upon discontinuance of the textile departments in the stores of such customers or discontinuance of business altogether.

(d) Extending to some customers contract provisions, or arrangements, whereby upon termination of such sales contracts all patterns in good salable condition remaining in the customer's inventories may be returned to respondent for credit while denying such agreements and arrangements to other customers.

(e) Requiring some customers to purchase previews while not requiring others to do so.

(f) Prepaying transportation and postage charges on shipments of merchandise to some customers and refusing to pay such charges on like shipments to other customers.

(g) The commission of any other like or related acts or practices to those herein set forth in paragraphs (a) through (f) of this order.

It is further ordered that the respondent, Simplicity Pattern Company, Inc., a corporation, directly or indirectly through its officers, directors, agents, representatives, or employees, or through any corporate or other device or otherwise, in or in connection with the offering for sale or distribution of dress patterns, or facilities, fixtures, or equipment, or promotional material or publications used in connection with the retail sale or offering for sale of dress patterns, in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

[fol. 15] (a) Contracting to furnish or furnishing counter catalogs, cabinets or other equipment or facilities connected with the offering for sale or sale of respondent's patterns to certain of its purchasers free while requiring other competing purchasers to purchase or rent such facilities.

(b) Contracting to furnish or furnishing counter catalogs, cabinets or other equipment or facilities connected with the offering for sale or sale of respondent's patterns to certain of its purchasers on any other terms not offered to all competing purchasers on proportionally equal terms.

The inclusion of such order to cease and desist in this

complaint will be without effect in the event you show cause, on or before the 8th day of September, A.D., 1954, why such order should not issue.

In witness whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 25th day of June, 1954.

By the Commission.

Robert M. Parrish, Secretary.

BEFORE THE FEDERAL TRADE COMMISSION

ANSWER—October 18, 1954

Simplicity Pattern Co., Inc., a corporation, by House, Grossman, Vorhaus & Hemley and Miller, Gorham, Wescott & Adams, its attorneys, answering the complaint filed in this cause, denies the violation by it of any statute referred to in the said complaint, denies that the filing of said complaint is in the public interest and alleges that the complaint seeks to curtail activities of respondent which are very much in the public interest and have been of great benefit to the women of the United States, as well as the [fol. 16] pattern and fabric industry, for many years, and more specifically, answers the allegations of said complaint as follows:

Count I

Paragraph One: Respondent admits that it is a corporation organized and now doing business under the Laws of the State of New York, with its principle place of business at 200 Madison Avenue, New York, New York.

Paragraph Two: Respondent admits that it manufactures printed dress patterns for use in the home making of women's and girls' clothing. Respondent denies that it is the largest corporation engaged in the manufacture of dress patterns in the United States, has not sufficient information to determine whether it is the largest manufacturer of such patterns, and admits that it is not the oldest manufacturers of dress patterns.

Paragraph Three: Respondent admits that it manufactures its own printed patterns at its factory at Niles, Michigan; it denies that all of its publications are now printed in its own factories. Respondent admits that it

publishes promotional material, including the fashion magazine "Modern Miss". This magazine and respondent's related promotional activities are directed toward promoting a greater use of home sewing generally. Such activities, including the delivery of such magazine to thousands of home sewing teachers throughout the United States, among other things, better equip women to make their way in life, enable them to learn to make their own clothes, permit women to be better dressed, commercially promote the sale of fabrics and patterns generally for the entire fabric and pattern industry, and otherwise promote the public interest.

Respondent admits that it publishes catalogues for use by dealers in the sale of respondent's patterns, which catalogues are utilized by dealers to permit prospective customers to choose one or more of respondent's patterns. [fol. 17] Respondent admits that it publishes fashion previews and that it publishes a fashion magazine and sewing book.

Paragraph Four: Respondent admits that its patterns and publications are shipped from its factory or warehouses to thousands of merchants throughout the country and constitute trade or commerce among the states of the United States and the District of Columbia.

Paragraph Five: Respondent admits that it sells its patterns to department stores, small, medium, and large dry goods stores, yard goods shops, "Ten cent" stores, mail order houses, and other outlets for its product. Respondent admits that it is a pioneer in the extensive distribution of dress patterns at low prices.

Paragraph Six: Respondent admits that it sells its patterns under written contracts, that its retail prices are "Fair Traded" under the provisions of applicable Federal and state laws, and that all of its customers pay a uniform price to respondent for its said patterns. Respondent denies that its contracts differ widely as to the terms and conditions of sale. Respondent admits, however, that there are differences in the terms and conditions of sale in its contracts, but it denies that such differences operate against the financial interests of its smaller customers and to the financial advantage of its larger customers. Respondent shows that some of its customers deal in patterns as an incident to the sale of fabrics. These customers are not concerned primarily with the, to them, inconsequential

profit they may make on the sale of a pattern, but are concerned primarily with the sale of fabrics for consumption, and other items for use, in making dresses from such patterns. To these dealers the pattern business is merely incidental to the larger and more profitable business of selling such fabrics and other items. Other dealers selling respondent's patterns, however, do not deal in fabrics, and their sale of patterns is not an incident to any other part [fol. 18] of their business but must itself be conducted on a profitable basis. Differences in terms and conditions in respondent's sales contracts reflect some of the economic differences and dissimilar situations of customers whose sale of patterns is merely incidental to the sale of fabrics and other items used in making dresses and of those to whom this is not applicable.

Paragraph Seven: Respondent admits that in the case of some customers it grants "standing debits" not accorded to other customers, but this is largely a matter of taking into account certain significant economic factors of normal and legitimate business activities and does not result from any attempt to, nor does it, prefer respondent's larger customers over its smaller customers. Respondent alleges that "standing debits" have not been utilized by it for unfair, improper, or illegal competitive practices.

Respondent admits that it signs contracts with its customers for varied periods of time but denies that its customers are required to do so. The duration of these contracts is not a matter of substantial concern to the customer but does effect substantial saving of time and expense for this respondent. Customers, whether large or small, are not preferred or granted advantages by the duration of respondent's contracts. Respondent alleges that the period of time for which it has entered into, and is entering into, contracts is not an unfair, improper, or unlawful competitive practice.

Respondent admits that customers who have merchandise on "standing debit" may return the same for credit, but it denies that this results in the loss to its smaller customers of the investments made in their inventories of respondent's patterns:

Respondent alleges that its sale of previews to some of its customers is not an unfair, improper, or illegal competitive practice. The use of previews by stores not handling

fabrics is not feasible and cannot be expected in normal commercial practice. The use of previews is appropriate [fol. 19] and necessary only in certain types of stores, and in such stores promotes the business of the dealer as well as that of this respondent. It is respondent and not the dealer who in the end, at discard time, is required to take the loss on unsold patterns. Respondent admits that it sell previews to those stores where their use is appropriate and necessary and does not sell them in stores where it is not appropriate and necessary. Respondent's practices with respect to previews do not discriminate among customers engaged in the same merchandising channels.

Respondent denies that its practices with respect to the prepayment of transportation are an unfair, improper, and unlawful competitive practice.

Except as admitted above, respondent denies each of the allegations of Paragraph numbered Seven, including each of the sub-paragraphs thereof.

Paragraph Eighth: Respondent admits that it is and has been in competition with other manufacturers in the sale of dress patterns. Respondent admits it was incorporated in 1927. Respondent admits that it pioneered in merchandising low cost patterns through chain "ten-cent" stores. Respondent's competitors have always included larger and more financially entrenched concerns. The success of this company has been predicated upon giving American women greater value in dress patterns at substantially lower costs. Respondent denies that its growth has been at the expense of the growth of the industry as a whole, and shows that its merchandising and educational practices have helped not only this respondent but the dress pattern, fabric, and related home sewing item industries as a whole. Respondent denies the allegations in Paragraphs Eight and Nine that the practices alleged in Paragraphs Seven and Eight were instrumental in obtaining or retaining the chain "ten-cent" store business. Respondent denies that it controls the market for patterns or has anything approaching control [fol. 20] of that market, denies that it has virtually all of the business, and denies that it is likely to improperly or unfairly retain any of that business unless the practices alleged in the complaint are terminated.

Paragraph Nine: Respondent denies that it engaged in

any unfair, improper, or illegal competitive practice to gain entry to the outlets described in the complaint as "Ten cent" stores, or that it practices any unfair, improper, or illegal acts to retain such business. Respondent admits that it manufactures patterns suitable for merchandising in such stores and that it has assisted in the merchandising of such patterns on terms and conditions that make it profitable to sell its dress patterns in stores not primarily engaged in the sale of fabrics. These merchandising outlets are now and always have been available to any manufacturer of dress patterns desirous, and capable, of utilizing these merchandising outlets.

Respondent denies that any act or practice alleged in the complaint unfairly makes its smaller customers bear a disproportionate part of its cost of doing business, denies that any such practice enables it to furnish larger customers with benefits not accorded to smaller customers, and denies that there is any discrimination or unfair treatment between its smaller customers and its larger customers. Respondent denies that furnishing of any benefit alleged in the complaint has contributed to or supported any degree of control by respondent over any segment of the pattern business. The volume of business currently enjoyed by respondent results from its success in the competitive struggle of offering a better pattern to the consumer at a lower price with improved service to the merchant. Respondent denies any dangerous tendency unduly to hinder competition. Respondent denies that its competitors or any potential competitor, or any of them, are foreclosed from any channel of distribution and denies that they, or any of them, are unable to secure any business because of any unfair, improper, or unlawful act of this respondent.

[fol. 21] Respondent denies that any of its commercial practices are unfair methods of competition and denies that any of its practices are discriminatory in favor of larger customers and against smaller customers. Respondent denies its practices tend to prevent smaller customers from making a normal profit and denies restricting, diverting, obstructing, foreclosing, or monopolizing free channels of trade and commerce to the injury of any of its competitors, either actual or potential, in the sale of patterns to any merchandising outlet.

Paragraph Ten: Respondent denies that any of its acts or practices are contrary to public policy or have a dangerous tendency unduly to hinder competition and create a monopoly. Respondent shows that it is a small business. The volume of its sales in 1953 was 12 million dollars. The industry is considered by many merely an adjunct to the sale of fabrics. Respondent does not sell goods, wares, or material but is engaged in the sale of services. Women do not buy dress patterns for the tissue paper with marks upon it, but rather purchase the style and design of dress patterns of their individual choice. Respondent's business is the sale of ideas, style and design communicated to the purchaser through printing on tissue paper. Respondent denies that any of its acts or practices constitute unfair acts or practices or unfair methods of competition in commerce within the meaning of the Federal Trade Commission Act.

Respondent alleges that many of the charges contained in Count I are not within the scope of the Federal Trade Commission Act, having been specifically dealt with by the Congress in the Clayton Act.

Count II

Paragraph Eleven: Respondent realleges its answers to paragraphs numbered one to six inclusive to paragraphs numbered one to six of Count I of the Complaint, which are by reference made a part of Count II.

[fol. 22] Further answering Count II: Respondent denies that it is engaged in the sale of a commodity or commodities within the meaning of the Clayton Act, as amended by the Robinson-Patman Act. Respondent's business is the sale of ideas, styles, or designs for use in making women's and children's clothing. The tissue paper on which these styles, designs and ideas are conveyed to the maker of the garment is merely the means of communicating the idea. The finished product is the dress and the pattern merely tells the maker where to cut the fabric, where to sew the seams, and how to style the garment.

Respondent's customers include dealers engaged primarily in the sale of fabrics and to whom the sale of patterns is merely incidental to their fabric business. These dealers are not in competition with other customers of re-

spondent who do not sell fabrics and are required to sell only patterns that they may deal in for profit. Respondent denies that it discriminates in favor of competing customers in its distribution of its counter catalogues. Respondent denies that it discriminates against competing customers in the distribution of cabinets, stands and other equipment.

Respondent shows that there are differences in its costs to different customers because of differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which its products are sold to its customers. Respondent denies that the value of any service or facility furnished to any one customer or group of customers and not furnished to other customers exceeds the difference in the costs of manufacture, sale, or delivery resulting from the differing methods or quantities in which such products are sold, distributed, or delivered to such respective customers.

In the alternative, this respondent shows that its distribution of counter catalogues and cabinets, stands, and other such equipment are not the furnishing of services or facilities within the meaning of paragraph (e) of Section 2 of [fol. 23] the Robinson-Patman amendment to the Clayton Act but constitutes the sale of commodities within the meaning of paragraph (a) of said section of the Act. Respondent denies that the effect of any such practices have the requisite statutory effect on competition provided for in said Act.

Respondent denies, both as to Count I and as to Count II, the allegations, and each of the allegations, of the complaint inconsistent with or contrary to the averments contained in this answer.

Respectfully submitted, House, Grossman, Vorhaus
& Hemley, Miller, Gorham, Westcott & Adams,
Attorneys for Respondent.

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1001 Connecticut Avenue, N.W., Sterling 3-3890, Washing-
ton 6, D. C., Attorneys for Respondent.

BEFORE THE FEDERAL TRADE COMMISSION

HEARING EXAMINER'S INITIAL DECISION AND ORDER—September 17, 1956

By William L. Pack, Hearing Examiner. William H. Smith, for the Commission; William Simon, Washington, D. C., and House, Grossman, Vorhaus & Hemley, New York, New York, by David Vorhaus, for the Respondent.

1. The complaint in this case charges the respondent, a manufacturer of dress patterns, with discriminating among its customers in the granting or supplying of certain services and facilities. The complaint is in two counts, Count I [fol. 24] charging that certain alleged discriminations are violative of Section 5 of the Federal Trade Commission Act; and Count II charging that other alleged discriminations are violative of Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act. Upon the conclusion of the reception of evidence in support of the complaint, respondent filed a motion seeking dismissal of the complaint for failure of proof. After hearing oral argument on the motion, the hearing examiner granted the motion as to Count I and dismissed the complaint as to that count, but denied the motion as to Count II (Tr. 1020-1032).

2. Subsequently, at the request of counsel for respondent, a conference was held by the hearing examiner with counsel for both parties (Tr. 1040-1057). Upon ascertaining the views of the examiner with respect to the availability of cost justification as a defense to a proceeding under Section 2(e) of the Clayton Act, counsel for respondent elected to offer no evidence and rested their case insofar as Count II of the complaint was concerned, Count I having already been dismissed. As the case had been argued at length by counsel on the motion to dismiss, and as the examiner had at that time expressed his views on the several issues, counsel for both parties elected not to submit proposed findings and conclusions. The case is now before the hearing examiner for final consideration.

3. Respondent is one of the largest manufacturers and distributors of dress patterns in the United States. It is a corporation organized under the laws of the State of New York, with its principal office and place of business at 200

Madison Avenue, New York, New York. There is no question as to the interstate character of its business; it sells its patterns throughout the United States. The patterns are in the low or medium price field, usually retailing at 25¢, 35¢ and 50¢. The company has been a pioneer in the distribution of patterns through the large 5 and 10 cent store chains, such as the F. W. Woolworth Company and the S. S. Kresge [fol. 25] Company. The complaint charges discrimination by respondent in favor of its larger customers, primarily the large 5 and 10 cent store chains (for convenience frequently referred to hereinafter as "10¢ stores"), in that respondent supplies to the 10¢ stores services and facilities not available to respondent's smaller customers, usually fabric or "yard goods" shops. Prices as such are not involved; respondent sells to all customers at 60 percent of the labeled retail price. And the patterns usually are retailed both by the 10¢ stores and the smaller stores at the labeled prices.

4. The discriminations charged in Count I of the complaint as violative of the Federal Trade Commission Act are (for brevity some of the charges in the complaint have been consolidated):

(a) That respondent extends to the 10¢ stores the privilege of obtaining their stocks of patterns under an arrangement known as a "standing debit", while denying this privilege to the smaller stores. Under this arrangement the 10¢ stores do not pay for the original inventory; it remains the property of respondent. As to the smaller stores, the standing debit appears to be a matter of negotiation. While some of the smaller stores receive no standing debit, being required to pay for their inventories in full, others who do a more substantial volume of business do receive a standing debit covering a portion of the inventory, as for example, one-half or one-third. As indicated, the standing debit arrangement relates only to the original stock or inventory. It has nothing to do with reorders of patterns; all customers alike pay for these.

(b) That respondent requires its smaller customers to enter into contracts for the purchase of its patterns over a period of five years, while some of the larger customers are accorded contracts covering a period of only one year;

and that the two types of contracts differ in other respects [fol. 26] (as to assignment, removal of goods to other premises, etc.) which are more favorable to the larger customer.

(c) That respondent's contracts with its smaller customers provide for the purchase by such customers of a designated number of respondent's "Monthly Previews", while no such requirement is made of the larger customers. These previews depict new styles, fabrics, etc. They may be imprinted with the store's name if desired. They are used by the stores for advertising purposes, being handed to the customer while she is in the store or inserted in packages containing purchases made at the store.

(d) That respondent pays transportation charges on shipments of patterns to certain of its larger customers, while requiring its smaller customers to pay such charges.

5. The discriminations charged in Count II of the complaint as violative of Section 2(e) of the Clayton Act are:

(a) That respondent supplies its monthly counter catalogs to its larger customers free, while charging its smaller customers for the catalogs. The price of the catalogs is \$1.65 or \$2.00 each, depending upon the type of binding. The catalog includes all of respondent's patterns and is essential to the retail sale of the patterns.

(b) That respondent supplies free to its larger customers cabinets and other equipment used in the storing and display of its patterns, while requiring its smaller customers to purchase or rent such equipment.

6. The record establishes that respondent's contracts with its customers do differ in substantially the respects referred to above. Respondent's principal defense to the proceeding is that there is an absence of competition between the 10¢ stores on the one hand and the smaller stores, such as yard goods stores, on the other. It is quite true that stores in the two groups approach the sale of patterns from widely different viewpoints, and that their methods [fol. 27] of selling the patterns also differ substantially. With the 10¢ store, patterns are handled as any other item of merchandise; that is, patterns must stand on their own feet and show a profit, otherwise the store will not handle them. The patterns are usually kept in a cabinet under the

counter, and about the only thing the prospective customer sees is the catalog, which is allowed a small space on the counter. No use is made of respondent's monthly fashion previews or any other advertising material.

7. The situation is quite different with the yard goods store. Usually it does not make any profit on patterns, nor does it expect to do so. It handles patterns to promote the sale of fabrics and because its customers expect this service. The patterns, catalog, fashion previews and other advertising material are prominently displayed and the customer is invited to sit and browse through the material, all in order to promote fabric sales.

8. Despite these differences between the approach and methods of the two kinds of stores, it is concluded that the two are in competition in the sale of respondent's patterns. It is difficult to say that two stores in the same shopping area, possibly side by side, are not in competition when they are selling the same article at the same price to essentially the same segment of the public. Also rejected is respondent's contention that patterns are not a "commodity" within the meaning of Section 2(e) of the Clayton Act.

9. It therefore seems clear that a case had been established under Count II of the complaint. The catalogs supplied the two groups of stores are identical. While the cabinets differ materially in design and appearance, the fact remains that they serve essentially the same purpose—as a storage place for the patterns pending their sale to the public.

10. True, there is no showing of competitive injury. But this, as the examiner understands, is not required in a proceeding under Section 2(e). Given the element of [fol. 28] jurisdiction, it appears that a prima facie case is established when it is shown that a seller is supplying to one customer facilities for use in the resale of the seller's products, and not supplying such facilities to the competitor of the favored customer on proportionally equal terms. In short, Section 2(e) appears to be a per se statute, requiring no proof of competitive injury.

11. The situation is quite different with respect to Count I of the complaint, which is based on the Federal Trade Commission Act. Here it is not sufficient to show discriminations among competing customers. Competitive injury.

must also be shown—not necessarily actual injury but at least facts which give rise to a reasonable inference of probable injury. In this respect the present count seems analagous to a proceeding under Section 2(a) of the Clayton Act. It is conceded by the Government that no competitive injury has been shown in the “primary” line, that is, competition between respondent and other pattern manufacturers. There remains then the question whether injury to competition among respondent’s customers has been established.

12. If there is proof of such injury, it must be found in the testimony of six witnesses, practically all of whom are proprietors of small yard goods stores. Two of the witnesses operate or formerly operated stores in New Haven, Connecticut, while the remaining four operate stores in the Washington, D. C., Metropolitan Area. In substance, the attitude of the witnesses appears to be that while they would like to be on even terms with the 10¢ stores with respect to the several matters referred to in the complaint, they do not regard the matters as of any particular importance. They emphasize that they handle patterns only to sell fabrics and because their customers expect the service. None of the witnesses regards the competition of the 10¢ stores in the sale of patterns as of any real consequence. In fact, two of the witnesses did not regard themselves as [fol. 29] being in competition with the 10¢ stores at all. While these two expressions of opinion are, of course, not conclusive on the fundamental question of the existence of competition, they serve to emphasize the apparent feeling of all of the witnesses that they are sustaining no substantial competitive injury as a result of the more favorable treatment accorded the 10¢ stores. The record seems clearly to be without any substantial evidence warranting a finding of injury to competition.

13. It is therefore concluded that Count I of the complaint has not been sustained. It is further concluded that Count II has been sustained and that the practices therein set forth are violative of Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act.

Order

It is ordered that the respondent, Simplicity Pattern Company, Inc., a corporation, and its officers, agents, rep-

representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of dress patterns in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Contracting to furnish or furnishing to any of respondent's customers counter catalogs, cabinets or other equipment or facilities connected with the handling, sale or offering for sale of respondent's patterns, unless such catalogs, cabinets or other equipment or facilities are available on proportionally equal terms to all customers competing with such favored customers in the sale of respondent's patterns.

IT IS FURTHER ORDERED that Count I of the complaint be, and it hereby is, dismissed.

William L. Pack, Hearing Examiner.

September 17, 1956.

[fol. 30] BEFORE THE FEDERAL TRADE COMMISSION

EXCERPTS FROM PETITIONER'S APPEAL BRIEF TO THE FEDERAL TRADE COMMISSION FROM THE INITIAL DECISION OF THE HEARING EXAMINER.

Count II of the complaint alleges certain discriminations by respondent in violation of Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, among the same customers involved in the allegations of Count I. This count challenges discriminations in favor of respondent's "larger" and against its "smaller" customers in the offering of allegedly unequal services and facilities connected with the resale of respondent's patterns. No allegations of competitive injury were made nor proof offered, the complaint proceeding on a construction of subsection 2(e) as *per se* statute.

The Hearing Examiner so construed Count II. He held that absence of competitive injury was immaterial, a vio-

lation of subsection 2(e) being made out on proof of unequal treatment to respondent's customers. Respondent's appeal from the Hearing Examiner's Initial Decision on Count II is dealt with elsewhere.

The cabinets have no real relationship to the "handling, sale, or offering for sale, of such" patterns; for they are merely a means of storing patterns which could equally well be stored on shelves or in fiberboard boxes. There is no evidence that any of the so-called "smaller independents" would have accepted these tin boxes; the inferences are all to the contrary.

Catalogs, admittedly, stand on a different basis than cabinets as they are used in the resale of the pattern.

[fol. 31] BEFORE FEDERAL TRADE COMMISSION

In the Matter of SIMPLICITY PATTERN COMPANY, INC., a Corporation

Docket No. 6221

Commissioners: John W. Gwynne, Chairman, Robert T. Secrest, Sigurd Anderson, William C. Kern, Edward T. Tait:

FINAL ORDER—March 13, 1957

This matter having come on for hearing upon the cross-appeals of counsel supporting the complaint and of respondent from the hearing examiner's initial decision and upon the briefs and oral argument of counsel in support thereof and in opposition thereto; and

The Commission having rendered its decision denying both appeals and adopting the findings, conclusions, and order contained in the initial decision:

IT IS ORDERED that respondent, Simplicity Pattern Company, Inc., shall, within sixty (60) days after service upon

it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order contained in the initial decision.

By the Commission.

Robert M. Parrish, Secretary.

Issued: March 13, 1957.

[fol. 32] BEFORE FEDERAL TRADE COMMISSION

In the Matter of SIMPLICITY PATTERN COMPANY, INC., a
Corporation

Docket No. 6221

Commissioners: John W. Gwynne, Chairman, Robert T. Secrest, Sigurd Anderson, William C. Kern, Edward T. Tait.

OPINION—March 13, 1957

On Cross-Appeals From Initial Decision

By Anderson, Commissioner:

This matter has come on for hearing upon the cross-appeals of counsel supporting the complaint and of respondent from the hearing examiner's initial decision filed September 17, 1956. Counsel supporting the complaint appeals from the dismissal of Count I of the complaint, and respondent appeals in effect from the order to cease and desist contained in the initial decision prohibiting the practices alleged in Count II of the complaint.

Count I of the complaint charges in essence that certain acts and practices engaged in by the respondent are unfair methods of competition and constitute violations of Section 5 of the Federal Trade Commission Act. The acts and practices alleged involve the granting of various benefits to some customers, while not according the same benefits to other competing customers. Count II charges that other alleged differences in treatment among customers violate Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act.

Respondent, Simplicity Pattern Company, Inc., a corporation, is engaged in the manufacture and sale of patterns [fol. 33] for use in the home making of women's and girls'

clothing. It is one of the largest manufacturers and distributors of dress patterns in the United States. Respondent's manner of distribution is through retail stores. Its customers include large 5 and 10 cents store chains, such as the F. W. Woolworth Company and the S. S. Kresge Company (hereinafter referred to as 10¢ stores), department stores, mail order houses, and smaller customers which are classed as fabric or "yard goods" shops.

This matter in general is concerned with the granting or supplying by respondent of certain services, facilities and preferential terms to large 10¢ stores while not according the same treatment to smaller customers such as fabric shops. The favored 10¢ stores, however, sell patterns on a somewhat different basis than the fabric shops. In the 10¢ stores the pattern is just another item of merchandise which must be independently profitable, whereas in the fabric shop the pattern is sold as a service or accommodation even at a loss with the expectation of a fabric sale. Ten cent stores generally do not deal in fabrics. Both groups of stores, it appears, sell the patterns at the labeled retail prices which are usually 25¢, 35¢ and 50¢.

The principal differences in respondent's contracts with its customers as alleged in Count I might be summarized as follows:

(a) Respondent extends to some customers, including large 10¢ stores, the privilege of obtaining their stocks of patterns through an arrangement known as a "standing debit", under which they do not pay for original inventories, while denying this privilege in whole or in part to smaller customers.

(b) Respondent requires smaller customers to enter into a five-year contract for the purchase of patterns, as against a one-year contract accorded some larger customers.

[fol. 34] (c) Smaller customers are required to purchase respondent's "Monthly Previews", used for advertising purposes, while no such requirement is made of larger customers such as 10¢ stores.

(d) Respondent pays transportation charges on shipments of patterns to certain larger customers, while requiring smaller customers to pay such charges.

The differences as alleged under Count II are substantially as follows:

(a) The supplying of monthly counter catalogs free to larger customers, principally 10¢ stores, while charging smaller customers for such catalogs.

(b) Supplying free to its larger customers cabinets and other equipment used in the storing and display of patterns, while requiring smaller customers to purchase or rent such equipment.

Appeal of Counsel Supporting the Complaint

The hearing examiner, on the conclusion of the reception of evidence in support of the complaint, dismissed, upon respondent's motion, Count I of the complaint for failure of proof. In his initial decision he concluded that the allegations in Count I had not been sustained and included an order dismissing the Count, stating that the record was without any substantial evidence warranting a finding of injury to competition. Counsel supporting the complaint does not take issue with the examiner's view as to the showing required in respect to injury to competition, that there must at least be facts which give rise to a reasonable inference of probable injury, but he does contend that there was error in the failure to find that the requirement on proof had been met. The substance of the argument made seems to be that the total values of the preferences granted to the 10¢ stores were of such substantial percentages of pur- [fol. 35] chases that they create a presumption of adverse competitive effect. It is contended that the type of discrimination shown prevents the independent businessman from competing with the 10¢ stores on a fair basis, as established by the evidence that the favored customers made a profit in the sale of respondent's products while the independents, the fabric shops, lost money on such sales.

As appealing as this argument may be, it is clear that under the circumstances the mere showing of certain discriminations among customers is not enough. The fact that the 10¢ stores profited from pattern sales while fabric shops did not is not itself determinative of the question, particularly in the absence of evidence that the desire or incentive of any fabric shop to compete with the 10¢ stores in the sale of patterns has been diminished or affected in any respect. While the contractual differences shown may be of such a nature as to enable 10¢ stores, if they

should choose to do so, to lower their prices or to otherwise divert trade from the smaller stores, there is no indication in the record that this has happened or that it is likely to happen, and no other sufficient evidence to show an adverse competitive effect on respondent's competitors or among its customers. Under such circumstances we must conclude that the allegations in Count I have not been sustained and that the hearing examiner correctly disposed of this issue by dismissing the Count.

This conclusion is based on the failure of proof, and nothing more. In deciding the question, the Commission is not giving its stamp of approval to the practices involved. The record clearly shows that respondent's practices result in substantial discriminations between different classes of customers. Under many usual circumstances there would be no doubt about the unfairness of such a method of competition. Certainly injury could be found, for example, if the evidence were to show that discriminations between groups of customers resulted in, or [fol. 36] would probably result in, diversion of trade to a favored group. The effect could be the same even though the customers discriminated against are large department stores or other large customers. We can render a decision in this matter, however, only on the basis of the facts before us, and since the record does not sustain the allegations, we must for that reason concur in the dismissal of Count I.

Respondent's Appeal

As above indicated, Count II of the complaint charges respondent with violating Section 2(e) of the Clayton Act, as amended. The hearing examiner having found that the allegations in the Count were sustained issued an order to cease and desist the practices set forth therein, from which respondent appeals.

Respondent argues principally that 2(e) should be read in conjunction with other subsections of Section 2 so as to permit the introduction of evidence relating to cost justification which is provided for in 2(a). We cannot concur in this argument. "Congress validly made the decision that conduct coming within the more definite standard of (e) was unlawful. We see no reason why the

limitations contained in (a), or their equivalent, should be read into (e)." *Elizabeth Arden, Inc., et al. v. Federal Trade Commission*, 156 F. 2d 132.

Respondent also contends that the evidence compels the conclusion that there is no realistic or meaningful competition between the 10¢ stores and the smaller independent stores since the former sell patterns on their own for a profit, whereas the latter do not intend to make a profit on patterns but sell them as a necessary incident to the sale of fabrics. Considering the circumstances appearing in the record, this argument is not wholly without merit, but we agree with the examiner's conclusion that the two kinds of stores are in competition in the sale of respondent's patterns. An element of rivalry exists in [fol. 37] spite of the fact that the fabric shops sell the product primarily as an accommodation. It appears that they may not profit dollarwise in the sale of patterns alone, but they recognize the value of such business for attracting customers who may purchase other goods. The two kinds of stores are vying for the same particular markets whatever their motives may be. In our opinion this sufficiently discloses the presence of competition between them.

Respondent asserts, in addition, that the cabinets have no real relationship, as the statute provides, to the "handling, sale, or offering for sale of such" patterns, and that dress patterns are not a commodity within the meaning of Section 2(e). There appears to be no merit in either of these contentions or various other arguments made by respondent, and each is rejected.

The appeals of both counsel supporting the complaint and respondent are denied and the findings, conclusions and order contained in the initial decision are adopted as those of the Commission.

March 13, 1957

[fol. 38] BEFORE THE FEDERAL TRADE COMMISSION

Transcript of Testimony (Excerpts)

MEYER CASHER, was thereupon called as a witness for the Commission, and having been first duly sworn, testified as follows:

Hearing Examiner Pack: Let the record show that Mr. Meyer Casher has taken the stand as a witness, having been subpoenaed by counsel supporting the complaint.

You may proceed, Mr. Smith.

Direct examination.

By Mr. Smith:

Q. What is your full name, Mr. Casher?

A. Meyer Casher.

Q. Where do you live?

A. 164 Legion Avenue, New Haven, Connecticut.

Q. Are you in business in New Haven?

A. Yes, sir.

Q. Does your business have a trade name?

A. Yes, I have. The Cotton Store.

.

Q. Mr. Casher, what size inventory of patterns—when I say “patterns,” I mean of the Simplicity Pattern Company—have you been maintaining?

A. I don't know exactly. Between \$400 and \$600.

Q. How do you pay for those patterns?

A. Monthly.

Q. About how much a month does that run you?

A. Well, they are never the same. About \$100 a month. Maybe a little more, maybe a little less than \$100 a month.

Q. Do you pay the Simplicity people for those patterns?

A. Yes, I do.

Q. You don't get any credit from them, do you?

A. Yes, we do get credit from them. When we send them back.

Q. I am speaking of credit for payments.

A. No. We pay by the month.

Q. You don't ask for credit on the payments? That is, you pay every month and you do not ask for credit?

A. Well, sometimes I run behind. Bills are supposed [fol. 39] to be paid on the 10th of the month and just sometimes I haven't got the money and I just can't pay it.

Q. Do they charge you any interest if you don't pay?

A. No. They are very nice about that.

Q. How long have you usually asked them to indulge?

A. About a week or ten days.

Q. Not over a week or ten days?

A. Maybe fifteen days. I don't know exactly. Sometimes, which happens many, many times, I haven't got any money, and I can't issue checks.

Q. Would you say 15 days is about the most you have asked for?

A. Yes.

Q. When you get these patterns, who pays transportation on them: you or the Simplicity people?

A. I do.

Q. Do you know about what your transportation amounts to, whether it is freight or postage?

A. Parcel Post.

Q. Do you know about what your postage bill is?

A. We order patterns according to what we sell and then we refill them, re-order them.

Q. Can you estimate about what that runs a month?

A. I would be just guessing. I don't know exactly. Sometimes we sell more and sometimes we sell less.

Mr. Simon: I think we would object to a "just guessing."

Hearing Examiner Pack: This has to do with the transportation cost, Mr. Smith?

Mr. Smith: Yes.

Hearing Examiner Pack: I believe the witness stated the packages come by parcel post and you now are undertaking to inquire about what the transportation cost is usually?

Mr. Smith: Yes.

Hearing Examiner Pack: Mr. Casher, objection has been made by counsel for the company. He does not want you to speculate. We appreciate that you may not be able to give the figure exactly, but we would like to have it as

nearly accurate as you can make it. In other words, an [fol. 40] approximation; not a mere guess, but a statement as to the approximate amount.

Does that serve your purpose, Mr. Simon?

Mr. Simon: I appreciate he can't give the exact amount. He said a moment ago that he couldn't say what it was. He said he could just guess.

Hearing Examiner Pack: I think that has been made clear to Mr. Casher now. We do not want just a guess, but a reasonably accurate statement.

Mr. Simon: If he is able to do so.

Hearing Examiner Pack: Yes. Of course, if he does know, he can just state.

Can you tell us approximately what the transportation cost is?

The Witness: About between four dollars to six dollars a month. I get one big shipment every month—not every month—well, I get a box full. I don't know how much it runs into. Then we get small amounts as we sell them: 27 cents, 35 cents, 43 cents—small amounts like that. Sometimes we get it once a week, sometimes twice a week. Sometimes we get them once every ten days. When they accumulate, we send the orders in and they ship it out to us.

Hearing Examiner Pack: You mentioned the amounts 27 cents and 43 cents. You are speaking of parcel post charges, is that right?

The Witness: Yes, sir.

Hearing Examiner Pack: And your best estimate is that it probably runs between \$4 and \$6 a month?

The Witness: Yes, something like that. I don't know exactly. I couldn't tell you unless I checked the books.

By Mr. Smith:

Q. Mr. Casher, speaking of transportation, you had to have an initial inventory to start this pattern business in your store, didn't you?

A. Yes, sir.

Q. Who paid transportation charges on that?

A. We did. I did.

[fol. 41] Q. You did?

A. Yes, sir.

Q. Your initial inventory amounted to about how much?

A. Well, when I first started with them several years back, maybe six, seven years ago, it was maybe \$250 or \$300. I don't know exactly. Between \$250 and \$300. Then I kept adding on and adding on.

Q. And you paid the transportation charges on your initial inventory?

A. Well, that was quite some time ago. That was about eight years ago. I wouldn't remember. I don't remember. I paid freight for the cabinet, I know that. I don't remember how the first order came in, when I first started to do business with them, if they came prepaid or collect.

Q. This contract you have here, which is Commission's Exhibit 1, is a renewal of a former contract, is that right?

A. Yes. I did sign a new contract since that time.

Q. How long have you been doing business with Simplicity?

A. About eight years.

Q. Then they should know whether or not they paid transportation charges on your initial stock?

A. Maybe they do. I don't remember.

Q. I say, they should know.

A. I know the cabinet came from Niles, Michigan.

Q. We are speaking about patterns now. Do you have any recollection of ever getting any patterns, either the initial stock or reorders, prepaid?

A. When they first started to do business with me, they came prepaid, yes, sir.

Q. They did?

A. Yes.

Q. Do you remember what year that was?

A. No, I don't.

Q. Mr. Casher; before I get too far involved in this contract, I would like to ask you something about the nature of your business. What size store do you operate in New Haven?

A. What do you mean?

Q. What size store is it? What size business do you do? Is it a large store or a small store?

A. It isn't small and it isn't large. Fairly good size, I think. You mean the length or the width or the amount of business we do?

[fol. 42] Q. I mean the size, the amount of the business you do.

A. I do around \$50,000 a year.

Q. What kind of store do you run? Is it a small department store?

A. Like a small general dry goods store.

Q. What did you write them about in regard to the previews?

A. I asked them to cut my order on the previews, that I am getting too many previews, which I have no use for.

Q. Did you tell them how many you thought you couldn't use?

A. I could use a hundred.

Q. What did they do?

A. Nothing.

Q. Have they been continuously sending them to you?

A. I am still getting three hundred a month.

Mr. Simon: Can we fix the date of this letter, whether it was before the contract or after the contract?

Hearing Examiner Pack: Will you try to do that, Mr. Smith?

By Mr. Smith:

Q. Do you know, Mr. Casher, about when you wrote the letter?

A. I don't know offhand right now exactly, but it has been quite some time.

Hearing Examiner Pack: So far as you know, Mr. Casher, was it before or after the contract, Exhibit No. 1, was signed?

The Witness: I think so, after the contract was signed.

By Mr. Smith:

Q. After?

A. After the contract was signed.

Q. Mr. Casher, this contract here, Commission's Exhibit No. 1, requires you, on the reverse side, to purchase a

monthly catalog each month, January through December. That has been going on since the contract was signed, hasn't it?

A. Yes.

Q. What do you pay for the catalogs?

A. I think it is \$2 a month.

Q. What do you pay for the previews?

A. A dollar and a quarter a hundred.

[fol. 43]. Q. Down here, under the caption, "Pattern Cabinets and Equipment," it says, "1 No. 525CY, Five Drawer Floor Cabinet, capacity 3000 patterns, \$150.00 each." Did you order that?

A. Yes, when I first got the patterns.

Q. Do you pay transportation on catalogs that you buy, or do they send you them prepaid?

A. Yes, I do pay the transportation.

Q. How do they send them to you: parcel post collect?

A. Parcel post. No. They prepay it and then they bill it to me.

Q. That's on the catalogs?

A. The catalog comes in with the patterns.

Q. Sir?

A. The catalog comes in with the patterns, at the same time.

Q. The catalog comes in with the patterns, at the same time?

A. Yes, sir.

Q. They are all shipped together?

A. Yes. They come in a carton.

Q. So you pay transportation, then, on both the patterns and the catalog?

A. Yes, I do.

Q. Getting back to this pattern cabinet—

A. I pay \$15 a year for the use of the cabinet, but the cabinet is not mine. It is owned by Simplicity Pattern Company.

Q. When you get through with it, you will have to return it to them?

A. Yes, I will.

Q. Mr. Casher, do you sell patterns in your store?

A. Yes, I do.

Q. You have competitors in the pattern business, do you not?

A. Yes.

Q. Among the so-called Five & Ten Cent Store chains, do you have any competitors in the sale of patterns in New Haven?

A. They sell them, as well as I do.

Mr. Simon: If your Honor please, I think he ought to fix the area he is talking about.

[fol. 44] Mr. Smith: I will get to that in just a second. I will fix the area and the street.

By Mr. Smith:

Q. Will you first name the particular Five & Ten Cent Stores?

A. Woolworth and Kresge.

Q. Are they located on the same street as your store is?

A. No.

Q. What street is your store located on?

A. My store is 164 Legion Avenue.

Q. Where is Woolworth's?

A. Chapel Street.

Q. How far is that from your store?

A. Well, I should say about 15 minutes walking distance.

Q. How many blocks?

A. I should say about twenty blocks, anyway.

Q. And this is New Haven?

A. Yes.

Q. Are there more than one Woolworth store in New Haven?

A. There is only one Woolworth store in New Haven.

Q. Is it quite a large store?

A. Yes, sir.

Q. How big a city is New Haven?

A. About 200,000.

Q. How far is Kresge's from your store?

A. The same distance, like from my store to Woolworth's.

Q. Does Kresge have a large store?

A. Yes, they do. Yes, sir.

Q. You say they are in competition with your store in the sale of patterns?

Mr. Simon: I object to that as a conclusion.

The Witness: They are not my competitors, but they sell patterns.

Mr. Simon: I withdraw the objection.

The Witness: I don't know if they sell patterns, but I am quite away from them. I don't know if they do sell. Maybe they do and maybe they don't. I don't know. I don't go into chain stores. Grant sells patterns, too.

Hearing Examiner Pack: In order that the record may be entirely clear with respect to the objection, I believe [fol. 45] your statement was that you withdrew the objection, Mr. Simon?

Mr. Simon: Yes.

By Mr. Smith:

Q. How far is W. T. Grant from your store?

A. About 20-21 blocks, but they are on the next block from Woolworth's.

Q. Is that your testimony, that you have never been in those stores?

A. I know where they are, but I don't go into them.

Q. You don't know what they sell?

A. I know they sell everything down there.

Q. Do you know whether they sell patterns or not?

A. I know they have two different kinds of patterns that I haven't got.

Q. Do you know whether or not they sell Simplicity patterns?

A. I don't know. I couldn't say. I couldn't say no, but I know they sell patterns, but I don't know whose make.

Q. Do they sell any other merchandise that your store sells?

A. Yes, they do, a lot of it.

Q. Do you consider them your competitors?

A. Yes, and they are tough competitors. I can't compete with W. T. Grant. It is impossible.

Q. What about Woolworth?

A. Well, Woolworth carries some things, but they don't carry some things I sell.

Q. They sell a lot of things you don't sell, too?

A. Yes, a lot of things I don't sell, and they carry a lot of things I do sell.

Q. What I am trying to find out is whether or not Woolworth's, assuming that they do sell patterns, would be in competition with your store in the sale of patterns?

A. No.

Q. You don't think they are?

A. I don't think so.

Q. Why?

A. Because I have a trade there. Woolworth's doesn't sell piece goods but they sell patterns, I think. They used to carry piece goods, but they cut out a lot of it, but they do sell patterns. I think they do.

[fol. 46] Q. I am not speaking of piece goods, I am speaking of the sale of patterns.

A. Yes. They used to sell both, and you asked me if they carry the same thing I do.

Q. I am not speaking of piece goods. What I am trying to find out is, whether or not Woolworth's sale of patterns is in competition with you?

A. No, no.

Q. You say that is because of the distance from you?

A. Yes, and the chain stores, they close at six o'clock, and I have a lot of people that come to me after six o'clock to buy patterns, because it is a working class of people that I have and they can't go down and they come to me to buy patterns.

Q. For that reason you say Woolworth is not in competition with you because they close at six o'clock and are too far a distance?

A. That's right.

Mr. Simon: He also added a third, that they didn't sell piece goods.

Mr. Smith: I am not speaking of piece goods. There is no piece goods involved in this case.

Mr. Simon: Now, Mr. Smith—

Mr. Smith: I am going by the pleadings.

The Witness: The only one who buys a pattern is a woman who sews. The woman who doesn't sew has no use for a pattern, and she has to have a pattern to know how much cloth to buy, and the women will not buy piece goods.

without a pattern, and in the back of the pattern it tells you how much cloth to buy, a certain amount of cloth and what width.

By Mr. Smith:

Q. Does Woolworth sell piece goods?

A. They used to.

Q. How long ago?

A. I think last year they cut it out.

Q. Last year?

A. Yes, sir.

Q. What part of last year?

A. Well, I think in October they gave it up.

Q. October '53?

A. 1953, yes, sir.

Q. What about the situation prior and during the time they sold piece goods?

A. Then they sold patterns.

Q. You mean they don't sell patterns now?

A. I don't know if they do or not.

[fol. 47] Q. You say they sold piece goods up until October 1953?

A. Yes. They gave up the piece goods, but I don't know if they continued with patterns in New Haven or not. I don't know.

Q. Up to October 1953, they sold patterns and piece goods—that is, Woolworth's?

A. Yes.

Q. Up to October 1953 was Woolworth's in competition with you in the sale of patterns?

A. No, they weren't.

Q. Why?

A. What do you mean "competition?" They sell patterns the same as I do. Maybe they sell more than I do because they have more traffic than I do.

Q. Do you know what competition means?

A. You mean undersell me?

Q. No, I am not speaking of underselling you. What I mean by competition is whether or not your store and Woolworth's are in the market to try to get customers, the same customers in their store that buys—

A. No. Woolworth's is quite a way from me and I am quite a way from them.

Q. You and Woolworth try to sell the same things to the same people?

A. No, I don't think so. When a woman goes into Kresge's or to Woolworth's, maybe she comes into my store. I have things that Woolworth doesn't carry, and Woolworth carries things that I haven't got.

Q. Let's get down to patterns and piece goods up until 1953.

A. She may buy a pattern from me but she wouldn't buy it off Woolworth's, because when she sees she buys a pattern, she may buy cloth.

Q. But Woolworth was selling cloth prior to October 1953?

A. I know. They did that at one time, but I don't know now.

Q. I am speaking now of the time they did sell it.

A. Yes.

Q. At the time Woolworth did sell patterns, did you compete in the same trade?

A. I don't know. I was selling patterns right along. Do you understand what I mean? Maybe I am wrong. Maybe I don't understand what you mean.

[fol. 48] Q. Do you know what competition means?

A. I do, yes, but we don't cut prices on patterns.

Q. You—what?

A. We don't cut prices on patterns. When a woman—

Mr. Smith: Judge, can you explain to the witness—

Hearing Examiner Pack: Finish your statement.

The Witness: When a woman comes in to buy a pattern from me, I don't think I go into competition with Woolworth's. Sometimes a woman comes downtown and she looks at a pattern in Woolworth. She may buy a pattern there and she may come in and buy the cloth off me. Do you understand what I mean? That's what I mean.

By Mr. Smith:

Q. That is speculation, but I am speaking of competition—

Mr. Simon: Mr. Smith, aren't you asking him to speculate?

Mr. Smith: I am asking him whether or not he is in competition.

The Witness: I don't think I am.

Mr. Smith: All right. You don't think so. We will let it go at that.

Do you have an objection, Mr. Simon, if Mr. Horne continues the examination?

Mr. Simon: No.

By Mr. Horne:

Q. Mr. Casher, of the patterns that come to you, do they have any label price printed on the envelope?

A. Yes, they do.

Q. And that is the price you sell at retail?

A. Yes, sir.

Q. Those patterns cost you 60% of that price, according to this contract, is that true?

A. Yes, they do.

Q. You stated, I believe, that you sell approximately \$100 worth a month?

A. Yes, I do.

Q. That's the retail price?

A. No. That is the wholesale price.

Q. You have to pay Simplicity \$100 a month?

A. Yes.

[fol. 49] Q. And if you would sell them at a retail price, that would be something over \$100 that you receive from the consumer?

A. Yes, that is right.

Q. It costs you, I believe you said, \$1.25 a hundred for previews, and you call them "fashions"?

A. Yes.

Q. You get three hundred of them, so that means you pay \$3.75 a month?

A. Yes.

Q. You stated, I believe, that your transportation charges are between \$4 and \$6 a month?

A. Yes.

Q. You buy a catalog a month, which runs you \$2, did you say?

A. Yes, sir, a month. Each month.

Q. You also pay \$15 a year rental on a cabinet?

A. Yes, I do.

Q. Divided by 12, that is \$1.25 a month?

A. Yes, sir.

Q. Taking the lowest figure for transportation of \$4 a month, that adds up, according to my figures, to \$11 a month that it costs you, in addition to the \$100 a month that you pay Simplicity?

A. Yes, sir.

Q. It costs you, in addition to your \$100 that you pay Simplicity for the patterns, these other charges?

A. Yes, sir.

Q. Do you figure you make a profit on patterns?

A. No, sir.

Q. Why don't you?

A. Well, there is a lot—

Q. Let me restate this question: Why do you handle them?

A. To help me sell my piece goods.

Q. You think it is a necessary part of your business, then?

A. Yes, sir.

Q. Did you ever try to sell piece goods without handling patterns?

A. Yes, sir.

Q. What was your experience?

A. Well, a woman says, "I got to look at the pattern before I decide."

Q. Do you figure you lost a lot of customers that way?

A. If I didn't have the patterns, I may lose a few, yes. Then it costs me a lot of money for inventory. Every three months we have to take an inventory of all the patterns that come in, and we have to discard. You see, the Simplicity people call in all the old patterns that go out of style. That [fol. 50] takes about a good half day's girl's time to pull out the patterns we send back out of the stock. Then we have to take an inventory of all the patterns left over. That takes a minimum of at least—I wouldn't exaggerate—about six to eight hours altogether.

Q. Mr. Casher, did you ever consider taking on another line of patterns?

A. I will tell you, in fact, if I could get away with it, I would like to cut it out altogether because they give me a lot of trouble, a lot of aggravation. I have a lot of aggravation

that is worth more than the patterns. Every time a woman comes up for a pattern I may not have the size, I may not have the style, and she says, "How come you don't carry someone else's?"

Of course, I will keep Simplicity, but I am not going to take any other line.

Q. I notice your contract runs for a period of five years. What would happen if you decided to discontinue Simplicity?

A. I may hurt my own business.

Q. Sir?

A. I may hurt myself.

Mr. Simon: What do you mean?

The Witness: Well, people come in and the first thing they say is, "Where is your pattern book?" and if I tell a woman I am not carrying patterns, she will run out of the store.

By Mr. Horne:

Q. What I meant is, suppose you decided to change pattern lines, quit Simplicity and take on another line. What would happen to your stock?

A. Well, Simplicity is well liked by the majority of people, and before I started to carry Simplicity patterns I have been asked by two, three hundred women as to which is the best patterns to buy, and they said Simplicity. I took a vote on it, and naturally, I was forced to buy Simplicity patterns against others, but once in a while we get a woman who comes in and says, "I don't like Simplicity," but from a hundred women, 95 will buy Simplicity, in my store.

[fol. 51] Q. That wasn't quite my question, Mr. Cashier. If you decide to discontinue Simplicity patterns and take another line—

A. I wouldn't. If I discontinued, I wouldn't put no other patterns into my store.

Q. What would happen to your stock of Simplicity patterns; could you send those back?

A. I don't know. I don't know what would happen. I imagine I would have to keep them or take a licking on them. I don't know if I could send them all back, if they will accept them all back. They will take them back at

certain times, when they go out of style, but I don't think they will take them all back. I don't think so.

Mr. Horne: That is all.

Cross-examination.

By Mr. Simon:

Q. Mr. Casher, you talked a minute ago about returning patterns. Do I understand you correctly that when a pattern goes out of style, as you put it, the company permits you to return those patterns for full credit?

A. At a certain time I did a terrific job on patterns in my store. Not very far from me, my competitor has also the same kind of store I have—maybe mine is a little bit different—and he started to carry patterns. Naturally I lost some of the business that I had.

Q. What is his name?

A. Naftal.

Q. He pays the same price as you do?

A. Yes, and sells them at the same price as I do.

Q. And he pays the freight and all those other things—

Mr. Horne: Your Honor, I don't know if this man is qualified to tell.

Mr. Simon: He said he knew.

Hearing Examiner Pack: I think it depends on whether he knows. He can state if he does. He can state that.

The Witness: I think he sells them the same price I do because every pattern—

[fol. 52] By Mr. Simon:

Q. As far as you know, he pays the same price, including freight, and everything else?

A. I don't know how he gets his. You see, I am running my store, not his.

Mr. Smith: I move that that be stricken from the record.

Mr. Simon: This is cross-examination.

Mr. Smith: I don't care if it is. You have no right to ask what another fellow does.

Mr. Simon: He certainly did on direct examination.

Hearing Examiner Pack: Let us see whether Mr. Casher does know what his competitor does.

The point has been made by one of the attorneys, Mr. Casher, in your statements about what your competitors do, you are not speaking from actual knowledge, but you are supposing, or guessing?

The Witness: Yes.

Hearing Examiner Pack: Is that correct?

The Witness: That is what I say, yes.

Hearing Examiner Pack: In other words, you really don't know what your competitor does?

The Witness: I don't know. I don't know exactly, but I think he follows the same as I do. Of course, I don't know what he does.

Hearing Examiner Pack: I think, gentlemen, that in view of the last statement, it is clear that Mr. Casher's former statements as to what his competitor does are not based on real knowledge, and therefore that portion of the testimony should be excluded.

By Mr. Simon:

Q. Mr. Casher, isn't it true that three times a year the company takes back discarded patterns?

A. Four times a year.

Q. And they give you credit for that, don't they?

A. They did at one time. They used to give me full credit. Then two or three times I lost—I only got 75% back.

Mr. Smith: Just a minute. Mr. Simon objected to my going into the actual terms of the contract. All that is [fol. 53] covered by the contract. All that is written out, what is taken back, what kind of patterns will be taken back, when they will take them back. All that is written down in the contract.

Mr. Simon: This was preliminary to another question. If you will just let me ask one more question:—

Hearing Examiner Pack: With that statement by Mr. Simon, is there still an objection, Mr. Smith?

Mr. Smith: I object to asking this witness what is in the contract.

Mr. Simon: I am merely trying to make something clear, without which my next question wouldn't have been understandable. As a matter of fact, I have one more preliminary question I have to ask, and that is:

By Mr. Simon:

Q. Whether they don't send him new patterns every month to add to the stock. Is that right?

A. They send new patterns.

Q. And the patterns that you discard four times a year, in substance, offset the new styles you get each month, isn't that right?

A. Yes.

Q. You said that you pay about \$100 a month for patterns. Does that include what you pay them monthly for new styles?

A. Yes.

Q. And the amount of money you pay them each month for the new styles is offset by the quarterly credits you get for the discards, isn't that right?

A. I don't quite understand you.

Q. Every month they send you a few new patterns?

A. Yes.

Q. And you have to pay for these?

A. That's right.

Q. And every three months they send you a list of the patterns that they have taken out of the catalog?

A. Right.

Q. And you take those patterns out of your stock?

A. Yes.

Q. And they give you credit for them?

A. They do, yes.

[fol. 54] Q. As a matter of fact, you don't even return the patterns, you just throw them away and send them the envelopes?

A. That's right.

Q. And they give you the credit?

A. Yes.

Q. Now, the \$100 a month, which would be \$1200 a year, that you said you paid them, is before taking the credit that they give you for the discards, isn't that right?

A. Right.

Q. How much do you pay them a year for patterns, net? It would be about \$300 a year less, wouldn't it?

Mr. Smith: Let him answer the question.

The Witness: Let's see, now.

By Mr. Simon:

Q. Do you understand my question, Mr. Casher?

A. It is never the same. I don't know offhand.

Hearing Examiner Pack; I think, Mr. Casher, what Mr. Simon really wants to know is, about how much each year do your credits for your discards amount to?

The Witness: They run about—well, the last patterns we send back, the last we get. We are trying to cut down so we don't send too many back, but I imagine I get about \$125 back credit every three months for the patterns I send back that go out of style.

By Mr. Simon:

Q. That is four times a year, is that right?

A. Yes, sir, four times a year, every three months.

Q. So you get about \$500 a year back from them?

A. Yes. I pay for those patterns and they bill me every month.

Q. They give you \$500 a year credit for patterns that you throw away?

A. That's right, yes.

Q. And they had to pay for manufacturing the patterns?

A. Yes.

Q. And they give you this credit for those patterns?

A. Yes, but I pay the freight for those patterns that I throw away.

Q. But they give you credit for the patterns that go out of style?

A. Yes, they do give me credit.

[fol. 55] Q. And you just throw them away?

A. Yes.

Q. And you pay them, net, somewhere around six or seven hundred a year, is that right?

A. I guess so. I don't know exactly if that is the right amount, but I do.

Q. Except that you said it was about \$100 a month and they give you \$500 a year credit?

A. Yes.

Q. I take it the profitable part of your business is selling piece goods?

A. Yes.

Q. About how much do you sell a year in piece goods?

A. My piece goods business—well, I don't know offhand. It is about between 25 to 30,000 dollars a year.

Q. How many sales do you make a year in piece goods?

A. All my sales are mostly piece goods.

Q. What is the average sale that you make when you sell piece goods?

A. What do you mean?

Q. How many transactions do you have in piece goods?

A. Sometimes we have more. I had a woman come in yesterday, she spent 60 cents. I had another woman come in, she spent \$21 for piece goods.

Q. What I am trying to find out, Mr. Casher, is, if a woman is going to make a dress, she has to buy a pattern and she has to buy the fabric?

A. Right.

Q. I am trying to find out whether you sell more patterns than you make fabric sales, or whether you sell less patterns than you make fabric sales?

A. I sell more fabrics than I do patterns.

Q. In other words, there are women who buy patterns somewhere else?

A. That's right.

Q. And come to you to buy piece goods?

A. Yes.

Q. And that happens more frequently than the women buying the patterns from you and buying the piece goods somewhere else?

A. That happens too.

Q. And the pattern part of the business, you don't regard that as a profitable part of the business?

A. No.

Q. You don't handle them to make any money, do you?

A. No, sir, I do not.

Q. Do you consider handling the patterns somewhat like [fol. 56] the cigarette dealer who gives you a book of matches when you buy a package of cigarettes?

A. No. I wouldn't carry it.

Q. As I understood you a moment ago, you only carry patterns in your store—

A. For accommodation.

Q. For accommodation to your customers?

A. That's right.

Q. If they cost you 35 cents and you sell them for 35 cents, you would still carry them to accommodate your customers?

A. Right.

Q. And the accommodation is because you sell piece goods on which you make a fair profit?

A. That's right.

Q. You talked about selling the patterns at a price that showed on the envelopes.

A. That's right.

Q. That is what is called fair trade, isn't it?

A. Yes.

Q. And there is a law in Connecticut—

Mr. Simon: I take it that Mr. Smith will agree that the Fair Trade Laws apply in Connecticut?

Mr. Smith: I don't know.

Mr. Horne: They have a Fair Trade Law there, yes.

By Mr. Simon:

Q. Did you go to Simplicity Pattern Company and ask them to sell you, or did they come to you?

A. I went to them.

Q. They didn't solicit your account.

A. No, they did not visit my business.

Q. And you went to them because the women had told you that that is the place to go?

A. "Why don't you carry Simplicity patterns?"

Q. I take it you would consider yourself a small customer of Simplicity?

A. Right, yes.

Q. You don't consider that they make a large profit in dealing with you, do you?

A. No, they don't.

Q. Do you consider that they render a service to the merchants in the country by selling a lot of little people like you?

[fol. 57]. Mr. Smith: Your Honor, as to what profits Simplicity makes in dealing with this customer here, he is not competent to answer.

Mr. Simon: He has already testified, Judge, that he buys about \$1200 worth of patterns a year and that they give him

credit for \$500 a year in patterns that he just throws away and burns up, which, on its face, would mean that he isn't a very profitable customer.

Hearing Examiner Pack: I believe the question before us right now is whether or not Mr. Casher considers the Simplicity Pattern Company as rendering him a service as well as the other small dealers in the country. Is that the question?

Mr. Simon: Yes, by selling—

Mr. Smith: I am trying to object to his question. As I recall it, he said Simplicity Pattern people didn't make any profit on the patterns they sold him.

Mr. Simon: The witness said, so far as he knew—I am not trying to quote him; but he didn't understand that he was a profitable customer.

Hearing Examiner Pack: That question was asked and answered without any objection.

Mr. Smith: I move to strike it, because I don't think this witness is competent to know anything about that.

Hearing Examiner Pack: I think that is true, gentlemen. It seems to me that Mr. Casher wouldn't know about the profit Simplicity makes on his account, but that isn't a matter really before us. I think Mr. Smith's objection is well taken and his motion to strike is well taken in so far as that is concerned—that is, Mr. Casher's expression of opinion that Simplicity didn't make any profit to speak of on his account.

Let us get to the particular matter before us, and that is, the expression of an opinion by Mr. Casher as to whether he thinks Simplicity is rendering a service to him and others in his situation by selling them patterns.

Mr. Simon isn't that a conclusion on the part of Mr. [fol. 58] Casher? Isn't it in the nature of argument rather than testimony?

I don't see how he could very well be expected to answer that except simply to speculate on the matter, and to say the least, express an opinion which would be a very general one. In other words, I am afraid it is not factual. I am afraid it does not help us in our present inquiry.

Mr. Simon: I am sure I don't want to argue the point with you, but I want to make two observations, after which I will rest on your decision.

First, this is a Section 5 case and not a Robinson-Patman case. If it were a Robinson-Patman case with its per se rules, we would find the facts in there and that would be enough, but this is a Section 5 case as to most of the important things.

There is a count under the Clayton Act, but the main case is under Section 5 of the Federal Trade Commission Act, and it is the economic question of whether it is an unfair method of competition, and that is a very broad economic question and not strictly a legal question.

The other observation that I want to make is that the complaint seems to state that we do things for large customers, who, as we will demonstrate to you before the case is over, are profitable customers. Things that we don't do for little customers, who, I believe we will demonstrate before the case is over, are not profitable customers, and we could comply with what the complaint seems to ask only by just cutting off these unprofitable customers and not doing business with them, because we can't afford to give them these services, and I was seeking to inquire from this witness whether that wouldn't be contrary to the public interest. That wasn't my question to him, but that was the ultimate thing I was trying to elicit.

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[fol. 59] Redirect examination.

By Mr. Horne:

Q. Mr. Casher, during Mr. Simon's examination of you, I believe you stated that at times you only received 75% of the price you paid for a pattern when you returned it on a discard.

Mr. Simon: Mr. Horne, he doesn't return them. He throws them away and they give him credit for it.

Mr. Horne: When he returns the envelope, thank you.

By Mr. Horne:

Q. Instead of receiving 100% for the discards, you have had at times received only 75%?

A. Right.

Q. Did that have to do with the amount of business you were doing at the time?

A. Yes.

Q. You said also that maybe sometimes a woman would come into your shop and she already has a pattern. She didn't buy it from you?

A. Yes.

Q. And she comes in to get some yardgoods?

A. Yes.

Q. Could that woman have gotten that pattern from Woolworth's or Kresge's?

A. Yes.

Q. She could very well have done that?

A. Yes.

By Mr. Smith:

Q. I gather you don't make any profit in the sale of patterns, do you?

A. I don't.

Q. Do you lose any money?

A. I do.

Q. How much do you think you lose selling patterns?

A. I don't know. Offhand, I never kept track. I couldn't say. I know I am putting in a lot of labor. When I come in, I got to put in the new stock where they belong. When I have to take inventory—in fact, a girl quit on me. She didn't know how to take inventory. I taught her how to do it and she didn't like the job. In fact, I lost money on patterns. I am losing money on patterns. When I send back patterns and I don't get my credit for the full amount, I pay for it, I am losing money.

[fol. 60] You say you pay for these patterns once a month, is that right?

A. Yes.

Q. How much money do you pay every month, about?

A. Well, some months are more, some months are less. Anywheres from \$125 to \$175.

Q. Cash, check?

A. I send them in a check. I mail them a check.

Q. Did you ever get any of that money back?

A. No. I don't get my money back. No, I never did.

Q. All you do is get credit for the discard of patterns?

A: I do, yes sir. Then they deduct them off my statement.

Q. But your pattern costs from \$100 to \$175 cash layout by you, isn't that so?

A. Yes.

Q. Under this agreement here that you signed on the back, you can't return any live patterns, can you?

A. No, I cannot return live patterns?

Q. All you can return is discarded patterns?

A. Right.

Mr. Smith: That is all.

Hearing Examiner Pack: Anything further, Mr. Simon?

Mr. Simon: Yes.

Recross examination.

By Mr. Simon:

Q. Mr. Horne asked you a moment ago if you thought women ever came in and bought fabrics in your store after buying a pattern in Woolworth's, and you said you thought you did. I take it that that is a case where a woman was probably walking through Woolworth's and she saw the pattern and she bought it on impulse and she came and bought the fabric from you?

A. That's right, yes.

Q. In that case, you are benefitted by the fact that Woolworth handled patterns?

A. That's right. She may have bought it in Woolworth or in some other store, I don't know. She bought the pattern from a different store, she came in with a friend, she happened to like the cloth I have; the design.

[fol. 61] Q. And you are benefitted by the fact that that fellow had the patterns?

A. Yes.

Q. Secondly, you said that there was a time when you only got 75% credit on your discards?

A. Yes.

Q. At that time were you doing less than \$300 a year business?

A. On patterns?

Q. Yes.

A. Yes.

Q. You were doing less than \$300?

A. Yes, \$300 or more, I get full credit.

Q. You were asked whether you lost money on the patterns and you said you did, but you didn't know how much; is that because you don't handle patterns to make money, but you handle the patterns only as an accommodation in helping you to sell fabrics?

A. That is right.

Q. Mr. Simon asked you, Mr. Cashier, I believe, if I recall the question right, you don't handle patterns to make money. Would you prefer to handle them at a loss, or would you prefer to make money on them?

A. I would like to make money, if I could, but I don't expect to make any money on it, but they help me to sell my other product, my piece goods.

Q. Buying these previews, catalogs, and rental on this cabinet, do they have any effect on your product?

A. Well, I deduct it off the profit and see what I get over. I am paying \$3.75 for the fashions and I have 200 which I throw away at the end of the month. Then I have a book that I pay \$2 a month—that's twelve months a year, \$24 a year.

Q. Those items affect your profit?

A. Yes, they do.

By Mr. Simon:

Q: I gather, Mr. Cashier, what you are saying to Mr. Smith is, you don't make money on patterns and the reason you carry them is simply because they help you to sell fabrics?

A. Right.

[fol. 62] Q. And that you are not particularly concerned with whether you make or lose money on patterns. You don't like the pattern business anyway and you would like to forget patterns altogether, but you have to have them to sell your piece goods?

A. If I would have known then what I know now about patterns, I wouldn't have patterns in my store.

Q. You don't like the pattern business, in any event?

A. I don't like it, but I can't quit. I got to have it.

Q. Because it sells piece goods for you?

A. Right. That's the only reason I have the patterns in my store.

Q. Of course there are a lot of other pattern companies you can go to?

A. But I wouldn't change.

Q. You think this is the best pattern?

A. Yes.

Q. That is because your women customers tell you this is the best pattern?

A. Yes, sir.

Eric O. Dick, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

By Mr. Horne:

Q. Will you please state your full name and address?

A. Eric O. Dick. My address is 2 Windsor Road, Baldwin, L. I.

Q. You are with the Advance Pattern Company?

A. That is correct.

Q. What is your position?

A. I am treasurer of the company.

Q. What is that address?

A. 1407 Broadway.

Q. Would you state the business of your company?

A. We are engaged in the manufacture and sale of patterns used for manufacturing ladies' and children's garments.

Q. That is manufactured for you by the home maker?

A. Yes, to make the finished garment.

Q. You are then in competition with Simplicity Pattern Company?

A. We are.

[fol. 63]. Q. Are you the youngest company in the field, as far as you know?

A. As far as I know, we are, of the major companies, as we might call them.

Q. How many pattern companies are there, do you know that?

A. I would say there are five pattern companies of the ones that I consider pattern companies engaged in similar type of business that we are in.

Q. Would you name those?

A. The order as I think their price ranges run is: Vogue, McCall, Butterick, Simplicity, and Advance.

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Cross-examination.

By Mr. Simon:

• • • • •
A. Each month we issue a new catalog, a catalog with a new cover.

Q. You send that out to each of your customers?

A. Right.

Q. You indicate in that catalog the new styles you have every month?

A. Right.

Q. Periodically, do you withdraw from the catalog discarded styles?

A. Correct.

• • • • •
Q. Is that the custom of the pattern business?

A. That is the custom of the pattern business.

• • • • •
Q. When you withdraw a pattern from the book, that is, from the monthly style book, does that make it impossible for the merchant, or virtually impossible for the merchant to sell the pattern that has been withdrawn?

A. It makes it impossible for him to sell it.

Q. And the reason for that is that the woman buys the pattern by going through the book?

A. That is correct.

Q. And if the style isn't in the book, she wouldn't see it and wouldn't ask for it?

A. That is correct.

[fol. 64] Hearing Examiner Pack: Is this your inquiry, Mr. Simon, as to whether or not this group of stores, or this category of buyers, the Five & Ten Cent stores, is allowed by Mr. Dick's company any discount other than the regular discount he has testified about?

Mr. Simon: Yes, sir. We both sell fair trade articles.

E. A. SULLIVAN, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. Mr. Sullivan, give your full name and address to the reporter, please.

A. Edwin A. Sullivan; 233 Broadway, New York.

Q. Is that the Woolworth Building?

A. That is the Woolworth Building, yes.

Q. Mr. Sullivan, you are an officer of the Woolworth Company?

A. No, I am not an officer of the Woolworth Company, sir. I am technically what is known as a buyer. It doesn't come under the official status as that of an officer.

Q. That is the F. W. Woolworth Company, is that right?

A. That is right.

Q. That is a corporation, I take it?

A. Yes.

Q. Their head offices are in the Woolworth Building at the address you have given us, 233 Broadway, New York?

A. That is right.

Q. How long have you been employed by the Woolworth Company in the capacity as buyer?

A. In the capacity of buyer, I have been employed with the Woolworth Company since 1948.

Q. Were you previously employed in some other capacity?

A. I was employed in various capacities as merchandising [fol. 65] in the districts, superintendent of stores, manager of stores.

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Q. Mr. Sullivan, in your capacity as buyer do you have anything to do with the pattern department in the Woolworth stores?

A. It comes into my jurisdiction from a merchandising standpoint.

Q. How many stores does Woolworth have?

A. I would say close to 1800. May we use that figure?

Q. Do all of the stores stock and sell Simplicity patterns?

A. There are some exceptions. There are a few exceptions, but I can't tell you how few.

Q. Can you give us the nature of those exceptions?

A. Well, it could be a small store where the business is confined in a neighborhood. It could be a store that has an extremely Colored population or some qualifying aspect that wouldn't justify carrying patterns in an individual location.

Q. This first contract here, Commission's Exhibit 2-A and -B, is dated October 1st, 1949. You were with the Woolworth Company at that time, were you not?

A. I was with the Woolworth Company, yes.

Q. Do you know whether or not Woolworth previously stocked and sold patterns to that date?

A. Yes. They previously stocked and sold them at that date.

Q. Do you know whose patterns they sold?

A. Same company; Simplicity, I presume.

Q. Do you know about how long Woolworth has been selling the Simplicity patterns in its stores?

A. Long before I had anything to do with the department or the merchandising of them, and I can't tell you exactly how long.

Q. Could you approximate it?

A. I think it would go back into the 20's—probably the early 20's or late 20's.

Q. That is, you are not sure whether it is early or late?

A. Now you are asking me something with which I am not acquainted.

[fol. 66] Q. But you are sure that Simplicity is the only company Woolworth ever handled, is that right?

A. To my knowledge.

Q. Do you know Mr. A. Q. Smith, who signed this original agreement in 1949?

A. Mr. A. Q. Smith was a former assistant secretary of our company who is now retired from the company.

Q. Mr. R. E. Williams, vice president: Do you know him?

A. I do. He is our active vice president in charge of merchandising.

Q. Is he still with the company?

A. Yes.

Q. I notice he signed this second agreement.

A. Because it is recent. The dating is recent.

Q. Yes. That is Commission's Exhibit 3-A, -B and -C. Is Mr. Williams, himself, more familiar with the pattern business done by Woolworth than you are?

A. I wouldn't think so.

Q. Woolworth originally, then, as you have stated—I might say, instead of saying "originally," I might say prior to the late 20's—did not handle any patterns, dress patterns at all?

A. I wouldn't be competent to say that because I was not in the position at the time where I should have that information available to me.

Q. Do you know anything about the circumstances under which the company, Woolworth, decided to stock and sell patterns?

A. No, I am not.

Q. You are not familiar with that?

A. I am not familiar at all, sir.

Q. Can you tell us from your knowledge whether or not they recently received a 6% discount on the patterns?

A. Yes.

Q. Tell us what you know about that.

A. I have seen it some place. Where at one time there was a 6% discount, it was later withdrawn by the company.

Q. When you say "company," you mean the Simplicity Pattern Company?



A. Yes. That was long before I had anything to do with patterns.

[fol. 67] Q. Do you know about when they withdrew that 6% discount?

A. No, I wouldn't be able to give you a good approximation of it.

Q. Do you know the reasons why they withdrew it?

A. The answer is, I do not.

Q. Do Woolworth stores sell yard goods of any kind?

A. In an extremely limited manner.

Q. Will you describe that?

A. Well, we had experimented over a period of time with so-called piece goods departments, and I think right at the present time it is confined to about ten units.

Q. Do you know where those units are located?

A. I do not. They would be extremely large stores.

Q. In these contracts, Mr. Sullivan, the Woolworth Company has no investment of its own in its pattern stock?

A. At the present time.

Q. And previously, under the 1949 contract, its investments, as appears from the agreement, gradually liquidated and was paid out by Simplicity?

A. That is correct.

Q. And Simplicity furnishes no previews to Woolworth, do they, in connection with patterns sales?

A. "Previews"—you mean by that—

Q. Fashion sheets.

A. No, no fashion sheets are furnished to our domestic stores. I believe they are furnished to our Cuban stores, in Spanish.

Q. Do you know why it is that Woolworth is not furnished with these fashion sheets or previews?

A. As far as I know, the operation of a fashion sheet or preview doesn't fit in with the operation of counter selling, if I can express it that way.

Q. Under this contract, Simplicity furnishes free catalogs to Woolworth, do they not, as they have agreed to do?

A. That is right.

Q. And Simplicity paid transportation charges on all shipments, both initial and re-orders, to Woolworth?

A. They do, sir.

Q. They furnish cabinets, to store the patterns in, free of charge, do they not?

A. They do, sir.

[fol. 68] Q. In servicing the 1800 Woolworth stores with these patterns, each individual store manager orders direct from the Simplicity people?

A. As the patterns are sold, he reorders what is sold.

Q. So that each of the 1800 stores have to be individually serviced by Simplicity, is that right?

A. Yes, it is correct.

Q. But you are totally unfamiliar with the circumstances leading up to the signing of this 1949 contract, I believe you said?

A. That is right, sir.

Q. You are familiar with both these contracts, are you not, Mr. Sullivan?

A. Yes, I am.

Q. You understand the various services, as we might call them, including ownership of the inventories by Simplicity and the other services, such as free cabinets, free postage?

Mr. Simon: I object to that. The contract is in evidence and speaks for itself. I can't agree with the characterization that Mr. Smith gives as to what he calls "services."

Hearing Examiner Pack: Won't it simplify it, gentlemen, to let it be understood that Mr. Smith's terms, whatever terms he may use in characterizing the terms of the contract, are not binding on anyone, certainly not on the Examiner, but they are merely Mr. Smith's own terms, and when he asks Mr. Sullivan if he is familiar with these various things, I take it that that, in substance, is simply asking Mr. Sullivan whether he is familiar with the various terms and specifications in the contract. So understood, there is no objection, is there, Mr. Simon?

Mr. Simon: No, sir.

By Mr. Smith:

Q. Mr. Sullivan, you are familiar with provision No. 7 of the contract dated October 1, 1949, which provides that Simplicity will during each month supply, without charge, each of the Woolworth stores with sufficient counter catalogs to properly service each store's pattern customers. Catalog

schedules are to be arrived at by mutual agreement. You are familiar with that?

A. I am.

[fol. 69] Q. You are also familiar with the following paragraph 8, are you not, where it says: "Simplicity will prepay transportation charges on all shipments to Woolworth stores, and Woolworth will prepay transportation charges on all shipments to Simplicity. In the event full transportation charges are not paid on Simplicity shipments to Woolworth stores, the unpaid balance may be deducted from the payments to Simplicity."?

A. I am familiar.

Q. Are you familiar with provision No. 10, Mr. Sullivan, the provision about the cabinets being furnished to Woolworth?

A. I am familiar with it.

Q. You are also familiar with the provision No. 11 of the original contract showing the gradual liquidation of the Woolworth's indebtedness in the pattern stocks, are you not?

A. I am familiar.

Q. You are also familiar with the amended agreement dated June 1, 1954, providing, as I understand it, for the ownership of the entire inventory of Woolworth—that is, pattern inventory by Simplicity?

A. I am familiar with it.

Q. Mr. Sullivan, based upon your experience as buyer and your long years of experience with the Woolworth Company, are you able to express an opinion as to whether or not the Woolworth Company would continue to buy these patterns from the Simplicity Pattern Company if these items I have just pointed out to you were withdrawn?

A. I would say that it would require a new look on the whole situation.

Q. Can you elaborate on that a little further, please?

A. Yes, I think I can. Patterns in themselves require an inordinate amount of handling in the stores. For instance, I would say our pattern stock is quite vast and would run into several million patterns, which means that at different periods of the year these patterns must be inventoried, must be counted, must be checked, whether we sell them or don't sell them. They must be checked, and it is an expen-

sive proposition to us to continue this inventory to know where we stand and know what we have in the stocks, and so on and so forth, and patterns at the present time pay, [fol. 70] we will say, a qualified 40 gross. If an added burden were put on to them, I am quite sure it would require very intensive exploration to find out if it would be profitable to us, for they must stand on their own feet, like any other piece of merchandise we sell, whether it is the hosiery department or dry goods department, or what it is.

Q. In other words, that would require an entire new appraisal?

A. Yes.

Q. For the pattern situation?

A. It would, indeed.

Q. So far as continued selling of them by Woolworth is concerned?

A. That is absolutely correct.

Q. I take it you are not able to express an opinion one way or the other on it as to what the decision of the officers might be?

A. A decision of that type would have to come from the officers of the company, from the merchandising heads, and I would not be competent to speak for them.

Mr. Smith: May we go off the record?

Hearing Examiner Peck: Off the record, Mr. Reporter.

(Discussion off the record.)

Hearing Examiner Peck: On the record, Mr. Reporter.

By Mr. Smith:

Q. Mr. Sullivan, the business of Woolworth stores is, I take it, a competitive business, is it not?

A. Yes.

Mr. Simon: I am not sure I understand that question, and I object to it.

Mr. Smith: Repeat the question, Mr. Reporter, please.

(The reporter read the question as follows:

"Question: Mr. Sullivan, the business of Woolworth stores is, I take it, a competitive business, is it not?")

Mr. Simon: Competitive with whom?

Hearing Examiner Pack: Do you wish to elaborate on the question, Mr. Smith?

Mr. Smith: If he has an objection to it, let him make his objection and we will see what it is.

[fol. 71] Mr. Simon: I object to it on the ground that the question does not indicate who their competitor is.

Hearing Examiner Pack: The objection is overruled. I think that can be developed further either on direct or cross. The question is whether or not the business is a competitive business.

The Witness: I would say all businesses are competitive businesses.

By Mr. Smith:

Q. I would like, Mr. Sullivan, for your answer to be confined to Woolworth.

A. It is a competitive business.

Q. I take it that in your long years of service with Woolworth you visited quite a number of their stores in various parts of the country, have you not?

A. I have, sir.

Q. And you not doubt have formed some ideas of your own about who their competitors mainly are, I take it?

A. Yes.

Q. Who would you say are their chief competitors?

A. Most anybody that sells the same type of merchandise is a competitor, whether it is a drug store or whatever it is.

Q. Woolworth sells patterns, and to your knowledge patterns are also sold in yard goods shops and department stores and various other places?

A. I have heard that they are. I haven't seen them, myself. I haven't made any effort to.

Q. Assuming that patterns are sold by a yard goods store or a department store closely adjoining a Woolworth store, which is engaged in the sale of patterns, that would be a competitive proposition, would it not?

Mr. Simon: I object. That isn't being hypothetical.

Hearing Examiner Pack: I think Mr. Sullivan may be permitted to express an opinion on that. The objection is overruled.

The Witness: If the merchandise was sold at the same price, it would be competitive.

[fol. 72] By Mr. Smith:

Q. We will assume patterns are sold at the same price. I believe the prices are stamped on the patterns, are they not?

A. Yes.

Q. So your answer is, as I understand it, if they are sold at the same prices, they would be competitive?

A. Yes, it would be competitive.

Q. Mr. Sullivan, do you know about the sales volume of Simplicity patterns by Woolworth stores, and the years?

A. In the year 1953, our sales volume was \$1,708,106.

Q. Do you have any other years?

A. No, that is all.

Q. Just 1953?

A. Just the recent years.

Q. That is the sales by your stores to the public?

A. That is right.

Q. That is the retail price?

A. Yea.

Q. Mr. Sullivan, that amended agreement here, whereby Simplicity owns all the pattern stock, are you familiar with the manner in which Woolworth makes payment to Simplicity and when it does and the circumstances under which it does?

A. Yes. Bills are paid within our regular routine of payment. I can't tell you whether it would be paid within one day or ten days or five days. It is on receipt of goods.

Q. The goods received, as I understand it, under this amended contract, belongs to Simplicity?

A. Initial shipments.

Q. Initial shipments?

A. Yes.

Q. When you say "on receipt of goods," do you have reference to re-orders?

A. That is what I am talking about, sir.

Q. And it is only the re-orders that Woolworth pays on, is that right?

A. It is the merchandise that is constantly received and turned over in the store which are the ones that are billed.

as each shipment is made, and each bill is honored as it comes in.

Q. And that is just for the re-orders?

A. Re-orders and new patterns.

[fol. 73] Q. And new patterns?

A. And new patterns.

Q. As I understand from this amended agreement here, does this inventory of \$1,207,462 remain pretty well constant?

A. It is fluctuating. It moves up and down and I can't tell you the extent of the movement. For instance, we are opening new stores from time to time, and that would go up or down according to the operation.

Q. Then is it true that Woolworth just pays for the patterns as it sells them?

A. No—

Mr. Simon: The witness said, no, to that question.

The Witness: There are many, many patterns that we have no stock that have been sold and we pay for. We may have them and they lay in the stock quite a time.

By Mr. Smith:

Q. Can you explain to us about this \$1,207,462 inventory: when and how does Simplicity get paid for the patterns which were sold out of that inventory, or does that remain constant?

A. It remains fairly constant. For instance, the patterns that are sold in the stores are replaced. We take an inventory three times a year.

Q. In other words, then you, replace it with new orders and pay for it when this inventory of \$1,207,462 becomes depleted?

A. Yes. In the ordinary transaction of business, the new patterns coming into the store are paid for when they are received. The re-orders go to Simplicity. They ship the merchandise and we, in turn, pay for it as received.

Mr. Smith: I hate to ask your indulgence again, but Mr. Horne has one question that he has in mind he wants to clear up. Will counsel have any objection to him asking a question?

Mr. Simon: I certainly don't if you don't Judge.

Hearing Examiner Pack: Very well. You may go ahead, Mr. Horne.

As you gentlemen know, I have been trying to avoid that as much as possible so that the attorney who begins the examination can conclude it.

[fol. 74] Mr. Smith: He has in his mind one question on the inventory which he can express better than I can.

Hearing Examiner Pack: Go ahead.

By Mr. Horne:

Q. Mr. Sullivan, in reference to this inventory, just for that purpose we will use this figure. Obviously this changes from day to day. We will use the figure of \$1,207,462. You have that many patterns in your store and three months later you take an inventory?

A. Yes.

Q. And you find out that you sold \$200,000 worth of those patterns?

A. No. The patterns that we sold are paid for as we sell them. The bills are paid every day, every week, every ten days, whatever it is. This establishes the relationship to the general stock that we have in our stores, but we paid for everything that we sell, re-order new merchandise as it comes to the store.

Q. But the re-order that comes in is merchandise already sold that belongs to Simplicity?

A. No. It can't be. It may be in the stock and never sold. Suppose a man re-ordered 50 patterns and only needed 10. He would have 40 patterns of a poor size in his files that he couldn't sell, so we would still have 40 patterns that he bought and didn't sell.

Q. Woolworth has stores in every State in the Union, doesn't it?

A. I should know that. I can't tell you whether we have one in every State of the Union. I am reasonably certain there is, but I can't tell you definitely.

By Mr. Smith:

Q. The last question I have to ask you, Mr. Sullivan, is probably a repetition of what you already said, but as I

understand, this \$1,207,462 inventory is subjected to slight fluctuation and remains pretty well constant?

A. I would say fairly constant.

[fol.75] Cross-examination.

By Mr. Simon:

Q. Does the Woolworth Company sell patterns to make a profit?

A. Yes, we do.

Q. If you were unable to make a profit on the sale of patterns, would you handle them?

A. I have answered that question before. I wouldn't be competent to make that decision or answer. The answer to that would come from merchandising executives, but I would say to you, Mr. Simon, that it would require a very, very strong look.

Q. I am not sure you understood me. Mr. Smith asked you whether you would continue to handle them if you were charged for catalogs and so on, which you said would require a new look. My question, without going into at what point you start losing money on the patterns, is, would Woolworth handle anything if they couldn't make a profit in selling it?

A. I think not.

Q. We had the testimony here yesterday of a man who said he was in the business of selling fabrics and—

Mr. Smith: If Your Honor please—

Mr. Simon: I appreciate being able to ask him a question.

Mr. Smith: I know, but you are talking about what a witness testified here yesterday. I think if you want to do that, you ought to read the record.

Hearing Examiner Pack: I think Mr. Simon should be permitted to conclude his question. You may go ahead, Mr. Simon, and then, Mr. Smith we will be glad to hear your objection.

By Mr. Simon:

Q. The witness testified here yesterday that he sold fabrics and handled patterns solely because the women wouldn't buy fabrics unless there was a pattern around.

Does the Woolworth Company sell patterns as an incident to the sale of anything else?

A. We do not, sir. We sell them as a profitable item and to make a profit.

[fol. 76] Q. They must stand on their own feet?

A. Absolutely must stand on their own feet.

Q. You don't sell patterns in order to get the customer to buy something else?

A. We do not.

Q. Do I understand that of the 1800 stores that you handle, there are only 10 that sell fabric?

A. Where we have a known piece goods department; yes.

Q. There are only 10?

A. Yes. That's to my latest knowledge.

Q. There might be 12 or 8, but it is roughly insignificant?

A. Insignificant to the total number of stores.

Q. And that is partly an experiment, is it, to see how fabrics would sell?

A. It is.

Q. Do you consider patterns as a part of your notions department?

A. It is part of the notions department.

Q. And that is thread and buttons and that sort of thing?

A. Sewing accessories of all kinds.

Q. Has the Woolworth Company been a leading merchandiser of notions such as thread and buttons and needles?

A. Probably the leading merchandiser.

Q. For many, many years?

A. Yes, for many years.

Q. Long before they handled patterns?

A. That's right.

Q. Are you acquainted with the printed pattern of the Simplicity Company as distinguished from the perforated pattern that other companies sell?

A. I know the qualification of one against the other, yes.

Q. Do you consider the printed pattern superior to the perforated pattern?

A. Very much so.

Q. Everything else being equal—that is, the price being the same and the financial responsibility of the company

being the same,—would you buy a printed pattern over a perforated pattern, or vice versa?

A. Our customers would buy a printed pattern over a perforated pattern.

Q. It is your practice, is it, to give your customers what they want so that you can make a profit?

A. That's right.

Q. Is that the reason you handle printed patterns?

[fol. 77] A. Well, it is the best pattern to sell. The customer responds best to a printed pattern.

Q. Is the reason you handle printed patterns because your customers want them?

A. That is right.

Q. Is it true to say, conversely, that the reason you don't handle perforated patterns is because your customers don't have the preference for them?

A. They were found at some time to be unsatisfactory. I don't know when or how.

Q. I gather that your company's purchases from the Simplicity Pattern Company of their printed patterns are not out of any love and affection for that company, but because you find their pattern sells better in your stores?

A. That is right.

Q. What is the turnover in the sale of patterns in your stores?

A. The turnover is extremely subnormal. Exactly one-forty-second for the year of 1953. One and forty-two hundredths per cent. In other words, we turn it over one and forty-two hundred times.

Q. That means if you have 100 patterns in the store, your inventory during the year, you sell 142 patterns?

A. That's right.

Q. What is the average turnover?

A. Corporation turnover?

Q. Yes.

A. Between 4 and 5, probably closer to 5.

Q. Does that mean, Mr. Sullivan, that if you have a \$100 inventory in an item, that your average sales during the year of that item will be between four and five hundred dollars?

A. That is correct.

Q. Whereas, if you have a \$100 pattern inventory, your average sales would be \$142?

A. That is correct.

Q. Therefore, an investment of \$100 in patterns would bring a lesser return in profit than an investment in something else where the turnover is much greater?

A. By comparison, it would.

Q. Does a profitable operation of your business require a [fol. 78] greater margin of profit in the low turnover items than in the high turnover items?

A. Would you rephrase that?

Q. Can you operate profitably on a smaller margin of profit in an item that has a high turnover than you can in an item with a low turnover?

A. Can we operate profitably—?

Q. With a smaller margin of profit in a high turnover item as distinguished from a low turnover item. Isn't it true the higher the turnover, the smaller margin of profit you need to operate your business?

A. That's true, yes. That is correct.

Q. And the lower the turnover, the greater margin of profit you need to operate your business successfully?

A. That is correct.

Q. You were asked some questions about fashion sheets, and I believe the question was whether Simplicity furnished you with fashion sheets, and you said no. Isn't it true that they neither furnish them to you nor sell them to you?

A. That is correct.

Q. You were also asked whether it was necessary for the Simplicity Pattern Company to service each individual Woolworth store, and you said you did. I am not sure I understand what was meant by the word "service." Do I understand correctly that the Simplicity Pattern Company ships patterns to each of the approximately 1800 Woolworth stores that handle patterns?

A. That is correct.

Q. With you the payments are made from one central source?

A. They are made from eleven central sources, district offices.

Q. But each store doesn't pay for them?

A. That's right.

Q. And in the sales end of the business, the Simplicity Company deals directly with you for all these stores?

A. That is correct.

Q. They don't call on each of the 1800 managers?

A. They do not.

Q. And when there is a new contract to be arranged, the [fol. 79] Simplicity officials and you get together and work it out?

A. That would be correct.

Q. And when that is worked out, that applies to the 1800 stores?

A. That's right.

Q. The only thing that is done individually for the stores is to ship their orders to each store?

A. That is correct.

Q. You were asked some questions about competitors, and one of the answers you made is that if a competitor sold a pattern at the same price,—I mean, if another store sold a pattern at the same price—you would regard him as a competitor; wouldn't you also regard him as a competitor even if they sold at a different price?

A. If they sold them at lower price, we would.

Q. If they sold them at a higher price, you would not consider them a competitor because you know the women wouldn't go to them?

A. That is correct.

Q. Isn't what you mean when you talk about a competitor is, that a man is a competitor of yours when you and he are engaging in a contest for the buyer's business?

A. I think that is a fair assumption.

Q. If there is no contest between you and the other fellow for that housewife or homemaker's patterns business, then you are not a competitor of his?

A. That is right.

Q. I take it that you don't know where the women who buy patterns in the Woolworth stores buy their fabrics.

A. I do not.

Q. But they don't buy them in the Woolworth store

A. They do not buy them in a Woolworth store.

Q. Every time a woman buys a pattern in a Woolworth store, they are necessarily a potential customer for someone selling fabrics?

A. That is correct.

Q. Is the business philosophy of the Woolworth Company based primarily on the large volume of sales of items selling for relatively small amounts of money?

A. Yes, it is.

Q. Has a good share of the success of the Woolworth Company been in sales of low cost items that most department stores and dry goods stores aren't even interested in handling?

A. When you say "low cost items," you mean items of low selling price?

Q. Selling for 10 or 15 cents.

A. Yes, that is correct.

Q. In a department store, or even a dry goods store, the selling cost of a 10-cent item or a 15-cent item in those stores where they have to have a sales girl wait on each customer and get the item out of the shelves, the selling cost would be extremely high on those items selling for a small amount of money, is that right?

A. They would, indeed.

Q. The Woolworth philosophy is to have all the items available before the public and the woman or the buyer comes and picks them out and the sales girl does a little more than put them in a bag and take their money; is that the method of operation of your company?

A. Generally speaking, that is the method of operations of our company.

Q. The ladies' dress patterns that we are talking about, they are not the type of merchandise that you normally handle?

A. No. It is an individual item by itself.

Q. A woman has to look into the book, a pattern book, to decide which one she wants?

A. That is right.

Q. And then your girl has to take that item out of a cabinet and hand it to her?

A. She has to be individually serviced.

Q. And your normal operation is the kind of thing where the woman picks the buttons up out of the counter and hands ten cents to the girl and walks out?

A. That is correct.

Q. Is part of the philosophy of your business to encourage shoppers to come in and, shall we say, browse around and look in the aisles and maybe buy things they hadn't intended to buy when they came in?

A. That is right.

Q. It is known in the selling trade as impulse sales?

A. Impulse buying.

Q. Is it fair to assume that a number of patterns are sold in your stores to women who did not intend to buy a pattern when they came in?

A. Definitely so.

[fol. 81] Q. And you have a very large number of customers in your stores, isn't that true?

A. Yes, that's right.

Q. In proportion to the number of dollars of sales you make each year, your number of customers would be far in excess of those of a department store or dry goods store or other store?

A. They would.

Q. Your average sale is much smaller?

A. That is right.

Q. Is it fair to say that in this large traffic that you get into your stores and the impulse buying by women of patterns, there are women who will buy patterns that they didn't intend to buy, and thereby become a customer for fabrics that they might not have otherwise purchased?

Mr. Smith: I object to that question on the ground that it is speculative, not evidence.

Hearing Examiner Pack: Read the question.

(The reporter read the question as follows:

"Question: Is it fair to say in this large traffic that you get into your stores and the impulse buying of women of patterns; there are women who will buy patterns that they didn't intend to buy, and thereby become a customer for fabrics that they might not have otherwise purchased?")

Mr. Smith: You have to read a woman's mind to say she bought a pattern that she didn't intend to buy. I don't see how you can do it.

Hearing Examiner Pack: Let me see if I understand your question, Mr. Simon. It is whether or not in Mr. Sullivan's

opinion the sale of patterns by his store may cause a woman to buy not only a pattern in one of the stores, but as a consequence of buying a pattern, may result in her going to some other store and buying a piece of goods to make the garment. Is that the point?

Mr. Simon: He has already testified that that has to happen. If she buys a pattern in his store, she has to buy the goods somewhere else because he doesn't have the goods. He has testified that he has a large volume of customers [fol. 82] in their stores, a great number of them. He has testified that a substantial part of their business is impulse sales. They display the things before a woman on the theory that she will buy something that she sees and that she might not have intended to buy, and this question was whether or not the large volume of traffic they have in their stores with the impulse buying of things people didn't intend to buy doesn't in his opinion create a market for fabrics in the other stores that would not exist if it weren't for his merchandising of patterns.

Mr. Smith: If your Honor please, I would like to have this to say in regard to that question: What difference does it make if it does create a market in other stores? What earthly difference could it make? We are not interested here in this case about fabrics. We are interested in dress patterns. We don't care what they are used for.

Mr. Simon: Do you really mean that, Mr. Smith?

Mr. Smith: Yes, I mean it. We are charging you with selling dress patterns, and nothing else.

Mr. Simon: I want to make sure that you meant what you said, that you don't care what they are used for.

Mr. Smith: In connection with the line you are talking about, that a woman buys a pattern in Woolworth store and then takes it down to a dress shop. I think that is immaterial.

Mr. Simon: May I withdraw that question?

Hearing Examiner Pack: The question is withdrawn.

By Mr. Simon:

Q. Mr. Sullivan, what can a pattern be used for?

A. It can be made for using a garment.

Q. Do you know of any other use for a pattern other than making a garment?

A. I do not.

Q. Is there any value whatever to the pattern other than to use it for making a garment?

A. None whatever, sir, that I would know of.

Q. Is it conceivable that anybody would buy a pattern for the paper that it is printed on?

A. It is inconceivable.

[fol. 88] Q. Is the purpose of buying a pattern to get the style and the design that is conveyed by that pattern to the woman?

A. That is correct.

Q. What is purchased in the sale of a pattern is not some paper but an idea or a design or a style for use in making a garment?

A. That is correct.

Mr. Simon: That is all.

Hearing Examiner Pack: Anything further, Mr. Smith?

Mr. Smith: Yes.

Redirect examination.

By Mr. Smith:

Q. Mr. Sullivan, on cross-examination you said, if I recall correctly, that competition is a contest for business, or words to that effect, and that if prices were the same there would be no competition. Did you say that?

A. I did not say that.

Q. Didn't I hear you say that?

A. I did not.

Q. I didn't think you did, but I just thought I heard it that way and I just wanted to get that straightened out.

A. I did not.

Mr. Simon: I think what he said was, if one fellow's price was substantially higher, there wouldn't be any competition because a woman wouldn't buy from him. Is that correct?

The witness: That is correct.

By Mr. Horne:

Q. Mr. Sullivan, you stated patterns have a subnormal turnover?

A. That is correct.

Q. I believe you also stated that your markup or mark-down was 40% off retail.

A. Yes, that is correct.

Q. Is that the same markup that you have on all your products that you sell?

A. Oh, no. Our markup is considerably higher.

Q. Considerably higher than that?

A. Yes.

Q. How about the products that have a faster turnover than patterns? Do any of those have a higher markup?

A. Yes.

[fol. 84] Q. Do any of them have a lower markup?

A. Conceivably, some do.

Q. Is it the normality of a turnover product geared considerably to the markup involved? For instance, the jewelry store has a very, very high markup, but it doesn't have much turnover, as I understand it. The jewelry store man couldn't say he had a subnormal turnover, could he? Isn't that all geared to the profit you make?

A. It is, only in one sense. Patterns are a commodity with us. They are a commodity just like stockings, ribbon, candy, or anything else, and their profitable operation is based on the turnover, the amount of investment, the value of the pattern, and so on and so forth.

Q. But you just can't hold up patterns and say it has a 1.42 turnover—

A. It probably has the lowest turnover of anything that I have any connection with.

Q. So it is the worst profit-maker you have? That doesn't follow, does it?

JOHN GEORGE, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Horne:

Q. Will you state your position with the McLellan Company?

A. I am president of McLellan Company.

Q. Mr. George, how many catalogs a month are furnished to McLellan by Simplicity?

A. That is a detail that is handled by the buyer, but as I understand it, we get a catalog in every store that handles a full line of patterns.

[fol. 85] Q. So that all deliveries of the actual patterns are made to the individual stores?

A. That is right.

Q. Mr. George, you get free catalogs, you say, and free previews and free cabinets, and you have the transportation paid on your shipments, and in addition, as far as you know, you get a 50% standing debit?

A. That's the general terms of the contract; yes.

CHARLES D. SMITH, was thereupon called as a witness for the Commission and, having been duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. And your business connection?

A. Assistant notion buyer, McCrory Stores Corporation.

Q. Do McCrory stores sell yard goods?

A. Some of them do.

Q. Do you know whether or not Simplicity furnishes free catalogs to McCrory?

A. They furnish us catalogs, yes, and I believe there is no charge on them.

Q. What about the cabinets?

A. They are furnished on a memorandum basis.

Q. Does the store pay for those cabinets?

A. No, sir.

Both patterns and piece goods are carried by our larger stores.

[fol. 86] Q. Each store gets at least one catalog a month?

A. Yes.

Q. In the case of the sale of patterns, if McCrory sells patterns on the same street with a department store or yard goods store which also sells patterns, would you say McCrory is selling patterns in competition with those other stores?

A. Yes. We would be competing for pattern customers.

Cross-examination.

By Mr. Simon:

Q. Is your sale of fabrics primarily at price rather than wide range and selection?

A. Based on price, yes.

Q. Is it generally what they call "short lengths"?

A. No. They are included, but we carry bolt material in some of the better selling items.

EDWARD GIMPLE, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. Please state your name for the record.

A. Edward Gimple.

Q. What is your address?

A. 59 Hillside Avenue, Milford, Connecticut.

Q. What is your present business?

A. I am not doing anything just now.

Q. What was your last business?

A. Textile.

Q. Was that in Milford?

A. In New Haven.

Q. How long were you in business in New Haven?

A. About over eight years.

[fol. 87] Q. When you say "textile business," do you mean yard goods?

A. That is right.

Q. The retail sale of yard goods to consumers?

A. That is right.

Q. In addition to yard goods, did you also sell dress patterns?

A. That is right.

Q. Whom did you buy these from?

A. From the Simplicity Company.

Q. Simplicity Pattern Company?

A. That is right.

Q. How long did you handle Simplicity patterns?

A. Since I was in business. Probably a couple of months after I went into business.

Q. Why did you put that line of patterns in?

A. Because we are in that line. We are textile.

Q. Would you mind explaining that a little more fully?

A. If a woman comes in to buy yard goods for a dress and if I haven't got a pattern, of course she is going to go somewheres to look for a pattern and she is liable to buy the material there, too, so I had to take it in.

Q. So you feel the handling of patterns is necessary to the sale of yard goods?

A. It is necessary for that line.

Q. Did you make any profit from your pattern sales?

A. No, sir.

Q. What arrangements did you have with Simplicity on your cabinets?

A. To pay so much a year.

Q. As installments on a purchase price, or rentals, or what?

A. Well, they told us if we held them long enough and we pay that rental, after that the cabinets belong to us.

Q. Did you buy catalogs also from Simplicity?

A. I did.

Q. Do you remember how many you had to buy?

A. Well, we used to buy one a month.

[fol. 88] Q. Do you remember what you had to pay for those?

A. Two and a half dollars I paid for the bigger catalog.

Q. Mr. Gimple, the address you gave at the beginning of your examination, is that the same address as the address of your store that you operated?

A. No.

Q. What was the address of your store that you operated?

A. 516 State Street.

Q. New Haven, Connecticut?

A. New Haven, Connecticut.

Q. Did you have a Woolworth store in town?

A. Yes, sir.

Q. How close was the nearest Woolworth store to your store?

A. About four or five blocks. I think it is five blocks.

Q. Did you consider yourself in competition with Woolworth's?

Mr. Simon: I object to that.

By Mr. Smith:

Q. In the sale of goods, that is?

Mr. Simon: I object to whether he considered himself in competition. The question is, whether he was in competition.

Hearing Examiner Pack: I think that the witness may properly be permitted to state whether he regarded himself as in competition with another concern. It is true it is to some extent an expression of a conclusion, but it is also factual matter as well, and of course it is subject to further development either on direct or on cross-examination, but I think the witness may be asked to state his view and express an opinion as to whether he was in competition with another business.

The objection is overruled.

Mr. Gimple, I believe you did not answer.

The Witness: No, I didn't answer. I personally think I handled a better class of goods than Woolworth's. I don't know if I was in competition with Woolworth's or not.

[Vol. 89] By Mr. Smith:

Q. Let me put it to you this way:—

Mr. Simon: He answered the question.

Q. Let me ask you another question: Did you try to sell the same type of goods to the same type of people as Woolworth's, regardless of price?

A. Certainly.

Q. I will name you a list of stores and ask you whether any of these were in New Haven: Kresge's?

A. Yes.

Q. How far was Kresge's from your place of business?

A. Kresge's and Woolworth's was on the same block.

Q. How about McCrory's?

A. No.

Q. How about McLellan's?

A. No.

Q. Do you know what is meant by variety stores?

A. Sure.

Were there any other variety stores in New Haven besides the ones I named, besides Woolworth's and Kresge's?

A. There are some, yes.

Q. Which ones are they?

A. Small stores.

Q. Are they part of chain stores?

A. No.

Q. They are local stores?

A. Local stores.

Q. Do you try to sell the same type of goods to the same people as Kresge's?

A. Yes. We handle the same kind of material, some of them. I handle woolens, too; Kresge's didn't.

Q. How about Sears Roebuck: Did they have a store there in New Haven?

A. They have.

Q. How far was Sears Roebuck from you?

A. I don't think Sears Roebuck handled that kind of material.

Q. How far were they from you?

A. They were about seven-eight blocks.

Q. Did you try to sell the same type of goods to the same type of people as Sears Roebuck?

A. No.

Q. Nothing you sold in your shop, then, was sold by Sears Roebuck?

A. No. At that time they were handling mostly different kinds of goods.

[fol. 90] Gambel & Desmond had a store there. They are out of business now.

Q. Was that a local store or a chain store?

A. I think it was a local store.

Q. How about J. J. Newberry: Did they have a store there?

A. Yes.

Q. How far were they from your store?

A. Around four blocks.

Q. Did you try to sell the same type of goods to the same type of people as Newberry?

A. Yes, we did.

Q. When did you first take on the pattern line?

A. I think it was two months after I went in the business.

Q. Why didn't you take on the pattern line when you first went into the business?

A. Because I didn't even know that we needed patterns.

Q. You didn't want to carry them, is that right?

A. I didn't want to carry them.

Q. Two months later you decided you had better carry them, is that right?

A. That's right.

Q. What made you decide you had better carry patterns?

A. The customers.

Q. The customers wanted them?

A. My customers decided for me.

Q. Did you go to the Simplicity Company, or did they come to you?

A. I think we wrote them.

Q. You wrote them?

A. Yes.

Q. And you said you wanted to take in their line?

A. That is right.

Q. Did you write to any other pattern companies?

A. No.

Q. How did you happen to write to them?

A. Well, the women were telling me that Simplicity is a good pattern.

Q. Your customers?

A. That is right.

Q. So you sought this line because your customers wanted it?

A. That is right.

[fol. 91] Q. Do I understand you to say that you would have preferred not to handle patterns?

A. Of course not.

Q. And you handled them only because your customers wanted them?

A. That is right.

Q. If the fellow next door were to have sold them the patterns but not sold them the fabrics, you would have liked it, wouldn't you?

Hearing Examiner Pack: The objection is overruled.

By Mr. Simon:

Q. Mr. Gimple, would you have preferred if the fellow next door sells the pattern if he didn't sell fabrics?

A. That's right.

Q. The Woolworth Company didn't sell fabrics, did they?

A. They sold.

Q. They sold fabrics in New Haven?

A. Sure.

Q. What kind of fabrics?

A. Cotton goods.

Q. Any other kind of fabrics?

A. I don't know about any other, but cotton goods I know they handled.

Q. How about silks, woolens, rayons?

A. Not woolens, but rayon.

Q. Do you know whether they did or not?

A. I know they handled cotton goods.

Q. Do you know whether they handled textiles other than cotton goods?

A. I am almost sure they didn't. No woolens.

Q. If a woman bought a pattern in a Woolworth store to make a dress or a coat or something other than out of cotton, she had to buy the textiles somewhere else, didn't she?

A. That's right.

Q. When a woman bought a pattern in a Woolworth store for a dress other than cotton, didn't she become a customer of yours?

A. Well, the people that are buying patterns are making cotton dresses.

[fol. 92] Q. Is that so?

A. Mostly.

Q. What did people use the fabrics they bought in your store for?

A. Well, they used to use it for suits, for dresses, for underwear. For everything.

Q. For making clothes, is that right?

A. That's right.

Q. Were the fabrics you sold used exclusively for making clothes?

A. That's right.

Q. And that required patterns?

A. That's right.

J. W. WALL, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. Please state your full name and your company.

A. J. W. Wall, Home Stitch Company, Inc., 4032 28th Street, South Arlington, Virginia.

Q. And you are President of the Home Stitch Shops, Inc?

A. That is correct.

Q. What is the address of the Home Stitch Shops, Inc?

A. 4032 28th Street, South Arlington, Virginia, Shirlington Section.

Q. What kind of business is the Home Stitch Shops engaged in?

A. It is a specialty shop of soft goods, piece goods, linens, domestics, and allied items.

Q. How long has that concern been in business, approximately? You don't have to be exact.

A. Six years.

Q. And you are the President of the company, is that right?

A. That is right.

Q. And how long have you been President?

A. Two years.

[fol. 93] Q. What was the cost of the catalogs, do you remember?

A. \$2.00 a copy.

Q. And how many copies of the catalogs did Home Stitch use each month?

The Witness: Oh, a month. I was putting it on an annual basis. Three in peak seasons and two in the dull months.

By Mr. Smith:

Q. Which are the peak seasons and the lesser months, is that shown on there?

A. Yes. January, two; February, three; March, 3; April, 3; May, 3; June, 3; July, two; August, two; September, three; October, three; November, three; December, two.

Q. They are on memo. Now, what about—is it necessary to have cabinets to keep these patterns in?

A. Yes, sir.

Q. Can you tell us about them, and how many cabinets Home Stitch Shop has, pattern cabinets for Simplicity, I mean?

A. Two.

Q. Well now, right next door to you is F. W. Woolworth, is it not?

A. Yes, sir.

Q. Do you know whether that F. W. Woolworth sells Simplicity Patterns or not?

A. Yes, sir.

Q. They do?

A. They sell Simplicity Patterns.

Hearing Examiner Pack: On the record. Mr. Simon has just stated in our discussion off the record that he was willing to stipulate that the Woolworth store in question does have pattern catalogs.

[fol. 94] By Mr. Smith:

Q. Well now, Mr. Wall, I would like to ask you in connection with your own store, is it necessary for you to have these catalogs in order to sell your patterns?

A. Yes, sir.

Q. Is it necessary for you to have cabinets in order to house these patterns?

A. Yes, sir.

Q. Do you know whether or not the Woolworth store next door to you has cabinets in which they house their patterns?

A. Yes, sir.

Q. They do or don't?

A. They do have.

Q. Now, this Woolworth store you speak of, is immediately adjacent to you, that is, that store is flush with yours on the same street?

A. Yes.

Q. And on the same side of the street?

A. Yes.

Q. Do you know whether that Woolworth store that I am speaking of there next to you sells notions?

A. Yes, sir; they sell notions.

Q. Now, what do you list under the category of notions, so the record will show what notions are? Does that include buttons and threads?

A. Zippers, thread, buttons, hooks, trim tape.

Q. You have been a merchant for sometime, considerable time. Are you able to express an opinion as to whether or not the sale of patterns has any connection with the sale of notions that you described?

A. Oh, yes, they are allied items that go hand and glove with each other.

Q. Does the pattern aid in the sale of notions, or does the sale of notions aid in the sale of patterns? How would you put that?

Mr. Simon: Or is neither?

The Witness: I would say they aid each other.

By Mr. Smith:

Q. Are you able to express an opinion, Mr. Wall, as to whether or not the Woolworth store, F. W. Woolworth store, right next to you, is a competitor of yours? Whether the [fol. 95] Home Stitch Shop is in competition with that Woolworth store right next to you?

Mr. Simon: What was that? Did you ask for his opinion, Mr. Smith?

Hearing Examiner Pack: Read the question, Mr. Reporter.

(The reporter read the question as follows:

“Question: Are you able to express an opinion, Mr. Wall, as to whether or not the Woolworth store, F. W. Woolworth store, right next to you, is a competitor of yours?

Whether the Home Stitch Shop is in competition with that Woolworth store right next to you?")

Mr. Simon: (I have no objection, if he regards them as competitors.

Hearing Examiner Pack: That, in substance, is the way I understand it. You may answer the question.

The Witness: Yes, sir; I regard them as highly competitive in the related items that each store sells.

By Mr. Smith:

Q. Now, will you designate those items, Mr. Wall, so the record will show that, please?

A. Sewing notions and patterns.

Q. They are highly competitive. That store is, with the Home Stitch Shop?

A. Yes, sir.

Q. On Friday morning you met a representative of the Simplicity Pattern Company. Did a representative of the Simplicity Pattern Company come by to see you?

A. Yes.

Q. What was his name?

A. Mr. Pullman.

Q. Who was with him?

A. I believe a Mr. Simon, who represented himself as a lawyer from the Simplicity Company.

[fol. 96] Q. What did they say about competition?

A. It was their opinion that having the Woolworth store next door to me carrying Simplicity Patterns was an asset to my store. And I contradicted that. I could not agree with it. That it was competition that I could very nicely get along without.

My own opinion was I preferred to have the patterns to myself, if it were possible.

By Mr. Smith:

Hearing Examiner Pack: I think it is leading, Mr. Smith. Objection is sustained for that reason. Mr. Wall, will you just tell us what was said by you on the subject of making a profit?

The Witness:

The question was being discussed between Simplicity, or Simplicity's representative, and myself, as to the quality of giving certain companies catalogs and then charging me for them:

I was paying for 32 copies a month at \$2.00 apiece, a \$64 expense that I felt if I were given those books the same as other companies were being given them, that my losses would at least be less. And if enough curtailments were made in the operating expenses of the pattern department we might break even, or even show a profit.

The Witness: Your Honor, do I understand that I am supposed to tell you how much volume of business I am doing in patterns?

Hearing Examiner Pack: Well, the approximate volume of business in patterns for last year. In other words, the best estimate you can give us as to the amount [fol. 97] of business you did in patterns. I take it it doesn't make a great deal of difference whether it is in number of patterns or in dollar volume, which ever way you can state it best. And it doesn't call for exact figures, but simply the best approximation; the best estimate you can give as to the total volume of pattern sales last year.

The Witness: Well, I would have to say that this is an approximate figure, and that the estimation involves all four pattern lines. I would estimate that the total volume for the four pattern lines was in the neighborhood of \$12,000.

By Mr. Simon:

Q. Can you estimate how many patterns that would be?

A. No, sir.

Q. In excess of 25,000 patterns though; wouldn't it?

A. The patterns range from 25 cents to \$2.50, and it would be very difficult without invoices to break down the number of unit sales.

Q. Just \$12,000 retail?

A. Retail.

Q. What is your biggest selling pattern?

A. Dollarwise or unit wise?

Q. Unit wise?

A. Unit wise, Simplicity.

Q. More Simplicity than any of the other three, is that right?

A. I should like to say on an annual basis that would be true. There are seasons when possibly some of the others would exceed it on a monthly basis.

Q. But in 1954 you sold more Simplicity patterns than any others, is that right?

A. I am assuming that.

Q. Well, I didn't ask you to assume it. I am asking you to tell me. You know it, I don't know.

A. I have already stated I didn't have a breakdown.

Q. Is it your testimony that 1954—

Mr. Smith: I am objecting to him asking any further question on that since it has been answered once, and maybe twice.

Hearing Examiner Pack: Mr. Reporter, was the question completed?

[fol. 98] The Reporter: No, sir.

Hearing Examiner Pack: We will let Mr. Simon complete his question; then Mr. Smith we will hear your objection to it.

Mr. Simon: Mr. Wall, in 1954, did you sell Simplicity Patterns, or rather more Simplicity Patterns than any other pattern you carried?

The Witness: I think I did.

Hearing Examiner Pack: Now, Mr. Smith, did you want to object to that?

Mr. Smith: He testified to that twice, maybe three times.

Hearing Examiner Pack: Did you get the last answer, Mr. Reporter?

The Reporter: Yes, sir.

Hearing Examiner Pack: Continue, Mr. Simon.

By Mr. Simon:

Q. The Simplicity Patterns are virtually all 35 cents, isn't that right?

A. Basically.

Q. What is your second biggest selling pattern?

A. I don't have that information.

Q. What is your best judgment as to your second biggest selling pattern? It is McCall's, isn't it?

A. It fluctuates with seasons considerably. There have been times when McCall was, and then there were times that Butterick has gone to the top, and then it completely reversed itself in any six-month period, depending on who has the best styling for that particular season.

Q. Do you know which was second for 1954?

A. No.

Q. You know it was either Butterick or McCall?

A. Unit wise?

Q. Yes.

A. I should think so.

Q. And Vogue was last?

A. Unit wise.

Q. Vogue is the \$2.50 pattern?

A. Yes.

Q. What is the price of McCall's?

A. \$2.50 is the top high style pattern with vogue. They also come down to 50 cents.

[fol. 99] Q. What are the price ranges of McCall's?

A. 35, 50, 60, 70, 75 cents, dollar.

Q. What is the price range of Butterick?

A. Some where in that same category.

Q. All right. Isn't the vast bulk of all the patterns you sell 50 cents or less?

A. Yes.

Q. In 1955 have you sold more patterns in the first ten months than you did in all of 1954?

A. I don't have that information.

Q. Do you know whether your pattern sales are greater this year or less than they were in 1954?

A. You are taking your figures from invoices which I haven't added up or broken down, and I don't get those figures in my store on that same basis; I can't answer that.

Q. I am asking you, Mr. Wall, if your pattern business is greater this year than last, or less than last year?

A. I am of the opinion it is greater than last year, because the store in general is doing a better business.

Q. Pattern business has gone up?

A. It is possible.

Q. Isn't it a fact that the total volume of sales of patterns is a very small percentage of the total volume of sales in your store?

A. Total volume of sales—

Q. Do you understand my question?

A. Yes, I understand your question. It is a small percentage to the total volume of the store, yes.

Q. Would you carry patterns in your store if you didn't sell dress fabrics?

A. I have never been faced with that question. If I ran a notion store and didn't carry piece goods I would then carry patterns, but if I was in ready-to-wear, I wouldn't carry patterns.

Q. Isn't the only reason you carry patterns in this store you have in Arlington is as a service to your customers who buy fabrics to make dresses?

A. Yes, we are working on that assumption now. But we would like to build it into a profitable operation.

Q. I didn't ask you what you would like. The only reason you carry patterns is as a service to your fabric customers?

A. I think so.

[fol. 100] Q. And you lose money on the patterns, is that right?

A. That is right.

Q. You lose money on the Simplicity line, is that right?

A. At the same ratio as the other lines.

Q. You lose money on all three of the other lines. With the four pattern lines combined, you are still losing money on that operation in the store. You lose money on the McCall line, don't you?

A. I should think to the same extent as any other line.

Q. You lose money on the Butterick line?

A. Same answer.

Q. Lose money on the Vogue line?

A. Same answer.

Q. Now, Mr. Wall, you carry four lines of patterns. I would assume if you carried only one or two lines you would lose less money on the patterns. Why do you carry four instead of one or two?

A. I am thinking of throwing out two of them.

Q. Why have you been carrying four lines in the past?

A. Trying to increase the sales of piece goods.

Q. To increase the sales of piece goods?

A. Yes.

Q. The idea is the more patterns a woman sees, the more likelihood she will buy the fabric, is that right?

A. The better your customer service is, the more likely a profitable sale.

Q. As far as you are concerned, this is purely to service her to get her to buy the fabrics?

A. Essentially, that is what it amounts to.

Q. Mr. Wall, do you know of any fabric store that carries patterns for any other reason than as a service to their fabric customers?

A. I think a store that has volume large enough can make money on patterns.

Q. My question is do you know of any store that handles fabrics that carries these patterns for any other reason than as a service to its fabric customers?

A. I should like—that would be the primary reason.

Q. Service to the customer?

A. Yes.

[fol. 101] Q. Now, how much money do you lose on your pattern department a year?

A. I can't answer that.

Q. Do you have any idea how much it is?

A. Well, I know what my investment is and I know what the turnover is, and I know what it should show me.

Q. My question is do you know how much money you lose in your pattern department?

A. No.

Q. Would you say it is at least \$500 a year?

A. I wouldn't say.

Q. Do you have any idea at all what it is?

A. No.

Q. Is it closer to \$100 than to a thousand or \$5,000?

A. Well, it certainly doesn't go to \$5,000.

Q. Doesn't it go \$1,000?

A. I can't answer that.

Q. You don't know whether it is a thousand or not?

A. No.

Q. If you got the same terms Woolworth gets, you would still lose money on your pattern department, would you?

A. I don't know that, because I am not fully familiar with their terms, and I don't know what effect it would have on the volume of business I do.

Q. You don't know how much you lose in your pattern department?

A. I don't have it in my head.

Q. Do you have it in your books?

A. I have records at the store.

Q. They show how much you lose in your pattern department?

A. I presume it could be figured from the records we keep.

How could you figure it from the records you keep?

A. By my purchases. I have no breakdown in retail sales for it. I explained that. But I could take invoices, see what my purchases had been, see what my opening inventory and closing inventory had been and determine my sales from that, and then take my operating expenses for that period of time and arrive at a fairly accurate figure.

Q. You would do that by charging to the pattern department, its proportionate share of all your operating expenses, is that right?

A. All selling costs, yes.

[fol. 102] Q. That would include rent, and the girl?

A. Yes.

Q. And the fact is that you carry the patterns only as a service to selling the fabrics?

A. That is what it amounts to now.

Q. Have you ever made the cost study to see what the pattern department loses?

A. I have made that cost study very accurately in another firm, but not in this firm.

Q. Not for this firm. What firm did you make it for?

A. Ivey's of Orlando, Florida.

Q. How much did they lose on the pattern department?

A. A considerable amount.

Q. How much?

A. I can't give you Ivey's figures.

Q. You mean you don't remember them?

A. If I did remember them, I wouldn't give them to you.

Q. I am asking you for them.

A. I am not affiliated with that concern any more; it is not for me to reveal the figures of a competitive concern I am no longer with.

Q. I am afraid that is not your function here. You have been subpoenaed and have to answer the question.

Mr. Smith: Your Honor, the witness feels that he shouldn't reveal that information about some other company.

Mr. Simon: This witness has testified, Judge, that the pattern department loses money, but I have asked him for twenty minutes, how much, and I can't even get an estimate. If he would give me an estimate I would have accepted it, but he refused to estimate and now he says he made a personal survey of how much the pattern department lost in a store, and it seems I am entitled to have that information, and not let Mr. Smith leave us in the dark.

Mr. Smith asked him did he lose, and the record should show whether it is a one per cent loss, or 100 per cent.

Mr. Smith: And before I asked the question, Mr. Simon went out to Mr. Wall's store and asked him that same question.

Mr. Simon: And I am asking it again now for the third time. I still want to know.

[fol. 103] Hearing Examiner Pack: As I understand it, Mr. Simon wants to know the approximate extent that Mr. Wall loses money on the pattern business, is that right?

Mr. Simon: That was my first question, and because he said he couldn't even give us an estimate, he then said he made a survey once on the loss of the pattern department in the last place he worked. And I was trying to get him to try to tell me what that loss was, where he actually made a real survey.

Hearing Examiner Pack: That, of course, was a business other than his own.

Mr. Simon: But it was his personal experience.

Hearing Examiner Pack: That is true, but I hesitate to inquire about that, or require a witness to disclose confidential information about another business with which he is no longer connected at all at the present time.

It seems to me that if what you want to develop, Mr. Simon, is that the sale of patterns in a business such as Mr. Wall, even in Mr. Wall's business, is a losing proposition, and he agreed with that, and I understand that he does, that he does lose money in the patterns, if he can give us some reasonable estimate, some approximation, either percentage wise or dollar wise, it seems to me that would give you the information that you desire and at the same time would not require the disclosure of this information in connection with another business firm which he regards, as confidential, and does not wish to disclose.

Mr. Wall, you have heard the discussion here. Are you able to give us an approximation of your losses in the pattern department of a business, either dollar wise, or maybe on the basis you think you can state? Mr. Simon, I believe, mentioned the figure of \$100, or \$1,000. Would you say that it is closer to \$100 or closer to a thousand, or mid-way between those two amounts, which you think you might lose per year on your pattern business?

The Witness: Yes, Your Honor. When I ran that personal survey, it was about 1949 or 1950, and at that time [fol. 104] we were not paying transportation costs, so, of course, the figures would change as of today's setup.

Mr. Simon: If he is going to testify about that survey, I am going to ask for the details. He can't give half of it.

Mr. Smith: The Judge is running this thing. He is answering the question put to him by the Court.

Mr. Simon: If he is going to tell half of that 1949 survey, I think we are entitled to have it all. But the question you asked him was merely to give his estimate of what he loses in his own store, and I would be very happy with that answer.

Mr. Smith: I would like for him to go ahead and give his explanation, Your Honor, in response to your question.

Hearing Examiner Pack: It was my understanding, Mr. Wall, that you preferred not to discuss the matter of your survey in the other store because you regarded that as confidential?

The Witness: Yes.

Hearing Examiner Pack: However, I understand your present statement does relate to that and Mr. Simon is raising the point that if you are going to tell part of that story he feels like he is entitled to all of it. My question did not relate to that survey, but rather related to your own business, and I was trying to see if we could get an approximation as to your losses last year, if there was a loss last year, with respect to the amount of it. Not in exact figures. I can appreciate you wouldn't care to disclose that unless you had to. And at the moment I don't see that it is necessary.

Can you give us an approximation, or your best estimate as to your loss on patterns during the last year, for example?

The Witness: My best estimate would be approximately \$5,000.

Mr. Simon: Thank you, sir. That is exactly what I wanted. So that if you got the catalogs free and postage [fol. 105] paid, and all that, you would still lose money on your pattern department?

The Witness: I wouldn't lose as much.

By Mr. Simon:

Q. But you would still lose money?

A. Yes.

Q. Now, I take it as a business man you are required to anticipate the needs and buying habits of the customers you seek to serve, is that right?

A. That is correct.

Q. And one of the things that you try to do in your shop in an effort to sell fabrics is that very thing?

A. That is one item.

Q. That is your main item?

A. No, I have another floor devoted entirely to different merchandise.

Q. What is that merchandise?

A. Curtains, draperies, linens, domestics, bedding, hand needle work—

Q. So that by "fabrics" you mean only dress goods?

A. When I say "fabrics" I mean dress goods.

Q. Fabrics is one of the main items that you sell?

A. That is right.

Q. And as an incidental to selling fabrics, or to promote the sale of fabrics, you try to sell them patterns?

A. Yes.

Q. Now, I have here four factors that I would assume a prospective pattern purchaser would consider in the competition of you and other people, and I would like for you to tell me if all four of these apply in your business, and if there are any others. First, is the element of price; that is a competitive factor, isn't it?

A. Yes.

Q. Second, is the element of service, the kind of service the respective stores give, is that one a competitive factor?

A. Yes.

Q. Third, is the breadth of the selection the store has to offer, the choice the customer has, that would be competitive?

A. We think so.

Q. And fourth, is the proximity to other needs that the buyer might have for the same project, would that be a competitive factor too?

A. State that again.

[fol. 106] Q. The proximity, the closeness to the other items which the buyer might need for the same project; would that be a competitive factor?

A. There are two lines of thought there. My patterns are not close to my piece goods.

Q. They are in the same store?

A. Yes, but on different floors.

Q. Is that a competitive factor though?

A. Proximity of the patterns to related merchandise?

Q. Yes.

A. I don't think it is any handicap to me that I have them on another floor.

Q. I just asked you whether that was one of the competitive factors; you assume your customers consider in deciding where to shop?

A. I think certain layouts is of prime importance.

Q. Can you think of any other competitive factors that influence the buyer of a pattern in making her decision where she is going to shop?

A. Say that again.



Q. Can you think of any other competitive factors that influence the buyer of a pattern in making her decision will make her pattern purchases?

A. Yes, I think I can.

Q. What are they?

Mr. Smith: It seems to me that Mr. Wall understands that question better than I do. It seems like it is vague and indefinite to me. Maybe Mr. Wall understands it.

Mr. Simon: Do you understand the question, Mr. Wall?

The Witness: What other factors are involved in the stimulation of pattern sales.

Mr. Simon: Yes.

The Witness: There are lots of other factors involved.

By Mr. Simon:

Q. What are they?

A. Going after the business so to speak.

Q. You mean by that, advertising?

A. That is one form.

Q. What else?

A. I do a fairly good job at home economics classes in the public schools.

Q. What else?

A. Churches.

[fol. 107] Q. Good. What else?

A. Well, I said schools. Two phases in the schools; one is for the home economics student, learning to study. The second is supplying patterns for groups within the school, such as cheerleaders or bandleaders, or marchers, or choral singers; by the pattern making one specific garment do. With the home economic teacher it is a repeated operation, semester after semester. In that business you have to go over and solicit and go all out to cultivate that teacher as well as the students and the students' parents.

Q. We would add solicitation as another competitive factor?

A. Yes.

Q. Any others that you consider apply to your store in the sale of patterns?

A. Well, I think the dispensing of that pattern across the counter is highly important as to the type of girl that sells it.

Q. Your sales girl's experience?

A. Yes.

Q. Any others?

A. You popped that one pretty fast.

Q. I am buying them all. They all sound wonderful to me.

A. I think of no other main selling points on the spur of the moment.

Q. Let us go back then. On number one you and Woolworth both sell patterns at the same price?

A. I think so.

Q. It is the same price, isn't it?

A. It is pre-ticketed; we sell it at the same price.

Q. 25 cents and 35 cents in your store, and exactly the same price in Woolworth?

A. Yes.

Q. Now, the second item of service, you have a long counter with chairs where the women can sit down and look through the books, is that right?

A. I do.

Q. At Woolworth she has to stand up at a small counter?

A. They stand in most stores; I am one of the few that still has seats.

Q. We are talking about your store and Woolworth's. You have seats where she comes in and sits down leisurely and looks over the patterns, is that right?

[fol. 108]. Mr. Smith: Wait a minute. Mr. Simon wants to talk about Mr. Wall's store and Woolworth's because it seems to be his advantage. A minute ago he brought in competition, or the question of competition between Mr. Wall's store and Singer Sewing Machine. Mr. Wall has testified that in most stores they don't have seats, and I think the testimony is complete.

Mr. Simon: I can only do one thing at a time. I am going to cover that. I am directing myself to the competition between his store and Woolworth to which he testified in direct.

Hearing Examiner Pack: I don't understand that Mr. Smith is objecting to the present testimony.

Mr. Simon: Mr. Smith makes a big point of the fact that I went into Singer. Isn't it a fact that Singer also has

chairs for the people to sit in while looking through the pattern book?

The Witness: I think a customer could find a chair in Singer's. They are devoted to seating their customers in all sales, sewing machines and so on. I don't know if they have chairs lined up at the pattern department or not.

By Mr. Simon:

Q. Haven't looked there lately?

A. No, I don't believe I have been in there in a month or so.

Q. You know whether Goldenberg's had chairs in their pattern department?

A. No, sir; I was never in that department.

Q. How do you know most don't then, if you don't know whether Singer or Goldenberg didn't?

A. I make it my business to find out; I inquire.

Q. Why don't you make it your business to find out what the guy next door and across the street are doing?

A. His business is not on a par with mine. It is a novelty store where nobody would sit, but if you want to make it Woolworth or the major department stores, I can more accurately answer that.

[fol. 109] Q. They are the ones you consider your real competitors?

A. They are the ones I like to pattern my business after.

Q. They are the ones you consider your primary competitors?

A. Any retailer with any merchandise is a competitor, but they are far enough away I can still operate in my location and meet their competition.

Q. I assume you don't want to answer my question?

A. Didn't I answer it?

Q. I asked you whether they weren't the ones you considered your primary competitors?

A. My primary competitors are on the south side of the river.

Q. Who is on the south side of the river?

A. Hecht's. Across over in Arlington or Alexandria. I will put it that way. They are my primary competitors.

Q. Hecht's? They are the big department store?

A. Yes.

Q. They are the primary competitors?

A. I consider them one of my strongest competitors.

Q. Now, going back in the Woolworth store, the pattern books sit on a small counter and the women have to stand and look at it, and in your store she sits leisurely and looks at the book?

A. Yes, it is optional. They can sit if they want to; it is there for them.

Q. In your store she has four lines of patterns she can look at, the four largest pattern selections; in Woolworth's she has only Simplicity?

A. That is correct.

Q. In your store she can buy her patterns and her buttons and zippers and thread and fabric and everything else she needs to make the dress in one store, is that right?

A. That is our objective.

Q. Is that your objective?

A. Yes.

Q. In Woolworth's store the main element in making a dress, namely, the fabric, is not available to her, is it?

A. No.

Q. Woolworth doesn't sell any fabrics?

A. No.

Q. Now, you added five more that are very good. One of them is you advertise the sale of patterns in your fabrics?

A. Yes.

[fol. 110] Q. Woolworth does not advertise the sale of patterns?

A. They advertise.

Q. The sale of patterns?

A. I don't keep up with items they run. They just use space in the same paper I do.

Q. Do you know of any instance when Woolworth has ever advertised the sale of patterns?

A. Recall a definite occasion, no.

Q. You recall any indefinite occasions?

A. No.

Q. Now, you do home economic class work in the schools, to promote the sales of fabrics and incidental patterns. Does Woolworth do any of that?

A. I don't know.

Q. You know of any work that has been done in that area in that line by Woolworth?

A. No.

Q. Do you know—you said you did work in churches to sell fabrics and patterns?

A. Yes.

Q. Do you know whether Woolworth does any of that?

A. No, I don't.

Q. You know of any instance where they have?

A. No.

Q. And then you said you do solicitation work. Do you know of any instance where Woolworth has done solicitation work?

A. Never solicited me.

Q. Know of anybody they have ever solicited to sell patterns?

A. No, I can't recall.

Q. The last item you mentioned was the salesgirl's experience. Does your salesgirl sell anything other than patterns and the things required in making a dress?

A. My girl sells nothing but patterns.

Q. Nothing but patterns?

A. Yes.

Q. Would you assume she had better qualifications than the girl in Woolworth's?

A. Well, at the moment my girl is very inadequate because she is very new, but it is possible I believe in having someone in that department who sews herself, and understands patterns and materials. You can't always have them.

Q. You concentrate on selling patterns?

A. Yes.

Q. Now, do you know of any basis or competitive factor [fol. 111] on which Woolworth's has an advantage over you in selling patterns to a woman who isn't inside, or hasn't yet entered the door of the Woolworth store?

A. How was that again?

Q. Do you know of any basis, or competitive factor on which Woolworth has an advantage in selling the pattern to a woman who has not yet entered the door of the Woolworth store?

A. Yes, I think if that woman is interested in making novelty stuff where notions are the primary ingredient of what she is making such as right at this season, where there are numerous Christmas things for toys and aprons being made, and they are carrying a lower price range of notions than I am. That woman would go to Woolworth to pick up the notions and avail herself of the patterns while she was there, and the patterns would be the same price as mine, but the notions would be cheaper.

Q. She would come to your store to buy the fabric though, wouldn't she?

A. I hope so, for fabrics involved in the sale.

Q. Can you make an apron without using fabric?

A. You can use plastics or use something else, but we assume a material is used in aprons. But material is not always bought with alterations.

Q. Can you conceive of any other basis on which Woolworth would have an advantage over you in selling patterns to a woman who hasn't yet entered their store.

A. Not except that their years of service in that location is longer than mine, and they might have a more established trade. In other words, by that, I mean Woolworth might be better known to the area in which I am operating than I am, from years of experience there.

Q. By the same token a woman would be less likely to expect patterns in a Woolworth store than in a fabric store, isn't that right?

A. I don't know what she expects.

Q. You don't? I appreciate, Mr. Wall, that you would like to get patterns as cheap as you can, is that right?

A. Absolutely.

[fol. 112] Q. Would you like to get them cheaper than Woolworth's if you could?

A. Due to sharpshooting in price?

Q. No, if Simplicity was willing to sell you below the price that Woolworth pays, that would make you happy, wouldn't it?

Mr. Smith: I object to that question.

Hearing Examiner Pack: I should think the answer to that question would be obvious, but we will take the answer. You may answer.

The Witness: Well, yes, I would be happier still if they gave them to me.

By Mr. Simon:

Q: But regardless of how happy or unhappy you may be, the fact that Woolworth pays a lower price for patterns than you do does not hurt you in competing for the sale of patterns, does it?

A. No, I don't think so.

Mr. Smith: If Your Honor please, that is an improper question. It does not hurt him? What does he mean by "hurt"?

Mr. Simon: The witness understood what I mean and I think Mr. Smith does too.

Mr. Smith: This involves a legal proposition and I don't know if the witness understands it or not.

Mr. Simon: I think not only does the witness understand it, but so do you.

Hearing Examiner Pack: The question has been answered, Mr. Smith, and I suggest that if you wish to take it up further you do so in redirect examination.

By Mr. Simon:

Q. Do you know of any instance, Mr. Wall, in which you have lost a pattern sale to Woolworth's?

A. Oh, yes, sir.

Q. That is because you were out of the size and she would go next door?

A. That could be one reason, and another one, they got there first.

Q. You know of any case where that happened?

[fol. 113] A. Yes, I have customers come in the store with patterns in their packages all the time.

Q. And you sold them the fabrics, didn't you?

A. I hope so.

Q. So those people, the fact that Mr. Woolworth sold them the pattern generated fabric buyers for you?

A. I hope so.

Q. Now, why do you have the patterns in the basement, Mr. Wall?

A. Because I don't have room for them on the first floor.

Q. Is that the only reason?

A. I think that is the main reason now.

Q. Is one of the reasons that it is good merchandising to have the woman walk through the store down to the basement for the patterns and let her see the things you have for sale?

A. That could enter into it.

Q. Does that enter into it in your mind?

A. In my particular store they have to go in opposite directions from patterns to the other goods. The stairs come down in the middle of the patterns at one end and merchandise at the other. We live in hopes they will see other goods.

Q. That is one of the reasons you have patterns in the back of the basement?

A. No, sir; I would put them on the first floor if I could work it out. I have tried everything in the world to put them there and can't without sacrificing something else.

Q. Why don't you sacrifice something else? Why don't you put the fabrics downstairs?

A. That wouldn't be good business.

Q. Because it is the fabrics you want to sell and the patterns are necessary evils, isn't that right?

Mr. Smith: That is nothing but arguing with the witness. That is not asking him a question.

Hearing Examiner Pack: Will you state the reason why you don't have the fabrics downstairs, Mr. Wall? I believe you did state that you didn't think that would be good business?

The Witness: Yes, sir.

[fol. 114] By Mr. Simon:

Q. Why wouldn't that be good business?

A. I have higher ceilings on the first floor. I can build up display and make more adequate displays of piece goods that have to be strung up than I could downstairs with a low ceiling. I can display blankets and linens and stuff like that on a lower level.

Q. And it is piece goods you are primarily interested in, and want to sell, isn't that right?

A. Piece goods, over patterns and notions, yes. But my volume is approaching piece goods in the other department with the exception of the patterns.

Q. We are not talking about draperies at the moment; just fabrics and patterns.

A. You said what did I primarily sell, and I do a volume of draperies almost equivalent to piece goods.

Q. I was excluding for a moment, the drapery business. I am sorry. Items like thread, buttons, zippers, are they profitable items?

A. Well, we assume that they are. They carry a normal markup.

Q. Patterns carry a normal markup, don't they?

A. But you don't have petty thieves in patterns to the extent you have in notions. You never know how much of the notions you lose, like threads, small things that are exposed to the customer. And the customer never goes into a pattern counter department.

Q. I take it the principal reason you carry those items with notions is as a service to your customer?

A. No, that is profitable.

Q. Threads and buttons are profitable?

A. We assume they are. They carry a normal markup.

Q. You just got through saying that patterns carry a normal markup and you don't have the thefts in that department?

A. Yes.

Q. That would indicate to me thread was less profitable than patterns.

A. The volume in notions is larger than in patterns.

[fol. 115] Q. You sell more than 12 thousand dollars a year in notions?

A. Yes.

Q. Maybe you and I aren't talking about the same thing in notions. I am not talking about \$2.00 belts as notions. I am talking about threads and buttons.

A. I only carry sewing notions.

Q. Do you carry belts for ladies' dresses?

A. No.

Q. Do you consider that thread and buttons are profitable?

A. Yes.

Q. All right. Now, you do a very substantial amount of this home economics promotion work in schools and churches, don't you?

A. I am new up here, but I am going out after it. I did a substantial amount of it in the previous concerns, and I hope to develop this into a very substantial business.

Q. That is very helpful in selling fabrics, isn't it?

A. Certainly it is.

Q. Simplicity spends a lot of money—you don't know how much, but you do know they do a lot of work with the schools in promoting home sewing, don't you?

A. Yes, I am conscious of that.

Q. They put out a book called Modern Miss for the youth sewing, don't they?

A. Yes.

Q. They put out a children's sewing book?

A. Yes.

Q. As I say, I don't expect you to know how much they spend, but you do know they do a lot of work which must cost them a lot of money promoting sewing to teenage girls in the schools?

A. Yes. I put them on a par with any of the others. They are good at it.

Q. That helps you, doesn't it?

A. Certainly.

Q. It does, or should help all other independent fabric dealers like you?

A. Should help any dealer.

Q. Doesn't help any man who doesn't sell fabrics, does it?

A. Does he sell notions?

Q. Isn't the man—suppose a woman buys a dress—

Mr. Smith: Let him answer that question.

[fol. 116] Mr. Simon: I thought he did.

The Witness: What is the question?

Hearing Examiner Pack: Read the question please.

(The reporter read the question as follows:

“Question: Doesn't help any man who doesn't sell fabrics, does it?”)

The Witness: I said it helps the dealer that sells notions. Anything pertaining to the making of the garment on home sewing.

By Mr. Simon:

Q. When a woman makes a garment at home, approximately what percentage of the total cost of the garment is in the fabric?

A. I couldn't answer that.

Q. Well, what is your best estimate? Would it be around 85 or 90 per cent?

A. There are seasons when 90 per cent would be a good figure. If they are making formals with fur trim sometimes the fur is equivalent to the material. We sell little mink furs and other furs which make a dress run very expensive. Sometimes it is equivalent to the dress, or rather the material, itself. But in the Summer time when they are making cottons the piece of material is 90 or 95 per cent of the garment.

Q. The material is 90 to 95 per cent of the cost of the garment.—

A. Is in the material.

Q. What would be your estimate of the average cost throughout the year, Summer, Winter, of the cost of the material as to the total cost of the garment?

A. That would take some thinking. To average it out for the year—right now the trimmings are running very expensive. In the Summer they run very low. I would say the trimmings—I am guessing at this—would average 15 to 20 per cent of the cost of the garment.

Q. The trimmings?

A. The trimmings that go with the piece of goods, the [fol. 117] patterns, notions, thread, zippers and everything that is involved in the making of the garment other than labor, the approximate per cent of the total cost of the garment.

Q. That is an average to the year?

A. I am just guessing at that, but I should think so. Maybe it is ten per cent or eighteen per cent.

Q. Some where around 10 to 18 per cent?

A. Say a woman pays \$5.00 for a piece of goods which is the normal sale. She buys a 50-cent pattern—

Q. \$5.00 is a normal sale?

A. I took that figure. It is normal for certain fabrics. And if they buy the 50-cent pattern, and a 35-cent zipper, and 20 cents worth of thread, and 20 cents worth of seam binding and pays a dollar and a quarter to get the belt.

Hearing Examiner Pack: Do you sell them the belt?

The Witness: The belt may come from Singer's next door, which is a service of theirs. Then it has exceeded 20 per cent of the garment. That is using that for illustration.

Hearing Examiner Pack: Off the record, Mr. Reporter.

(Discussion off the record.)

Hearing Examiner Pack: On the record.

By Mr. Simon:

Q. Now, Mr. Wall, you were talking about the findings that go into a garment and sometimes decreases the percentage of cost of the fabric, and the items that make the fabric a less sizable portion of the cost, like mink collars, is that right?

A. Yes.

Q. Woolworth doesn't handle any findings like mink collars, do they?

A. I don't think so.

Q. You know, don't you?

A. It is pretty generally sold everywhere, fake trimmings.

Q. Do Woolworth's handle the fur trimmings?

A. I don't know.

Q. In any event, whether it is 82 per cent, or 90 per cent, which you said, between 10 and 18 per cent, the big bulk of [fol. 118] what the woman spends making a dress goes for the fabric?

A. I think so, yes.

Q. So when Simplicity spends a lot of money promoting home sewing in schools, the great bulk of the benefit of that comes from the man who sells the fabric, is that right?

A. Yes.

Q. Now I show you two documents which I will have the reporter mark Respondent's Exhibit 11 and 12 for identification.

(The documents referred to were marked Respondent's Exhibit 11 and 12, for identification.)

Are you familiar with those two publications?

A. Yes, I am familiar with them.

Q. And in those publications, Simplicity very extensively promotes the sale of various kinds of fabrics to be used in home sewing; is that right?

A. Yes.

Q. And you and stores like you get the benefit of that?

A. Yes.

Q. And Woolworth does not, to the extent of fabrics?

A. To the extent of fabrics, no.

Q. That is between 82 and 90 per cent of the total expenditures in home sewing?

A. Some where near that.

Hearing Examiner Pack: You said these two papers had been marked Respondent's Exhibit 11 and 12 for identification.

Mr. Simon: Yes, I believe those are the next two. I should have asked you first.

Hearing Examiner Pack: That is correct.

Mr. Simon: Respondent's Exhibit 11 is an issue of Modern Miss, is that right?

The Witness: Yes.

By Mr. Simon:

Q. That is published periodically by Simplicity, is that right?

A. Yes.

[fol. 119] Q. In your opinion is that a fair sample of the various issues of Modern Miss?

A. Yes, I think so.

Q. And Respondent's Exhibit 12 is an issue of the Simplicity Pattern Book, and that is published periodically by Simplicity?

A. Yes.

Q. Would you regard that as a fair sample of the Pattern Book?

A. Yes.

Q. Judge, I offer Respondent's Exhibit 11 and 12 in evidence.

Mr. Smith: I object to them because he didn't show how they were published, who they were circulated to, or what. The mere fact they are published doesn't mean anything.

Mr. Simon: The witness has already testified those are used in promoting home sewing in the school.

Mr. Smith: That doesn't show how they are used.

The Witness: They are sold; we collect a price for them.

Mr. Smith: It isn't something free that is given away with this company. I object to them because it is an inadequate description of them.

Mr. Simon: I will go into more detail.

Mr. Smith: I don't want you to do it for me. I am objecting to the testimony of the documents.

By Mr. Simon:

Q. You testified earlier Simplicity did a substantial amount of work in the schools to promote sewing. Will you tell us in detail what Simplicity does to promote home sewing in the schools?

A. I don't see much of that publicity. I only get it in hearsay from the home economic teachers that come into the store and often times refer to it.

Q. Is there any better way to learn about it than from the very teachers who are doing the work with the students?

A. That is a mighty satisfactory way.

Q. And these home economic teachers that are teaching the girls to sew, they tell you about the work Simplicity does with them, is that right?

A. On occasions, yes.

[fol. 120] Mr. Smith: I object to that on the grounds it is hearsay, as to what these teachers tell them.

Mr. Simon: I think under the Danbury-Hatter Case, which is cited very frequently around here—

Hearing Examiner Pack: I think it is hearsay, but it seems to me it is harmless. I don't see any point in the matter one way or the other. The testimony may remain as it has already been given. Go ahead, Mr. Simon.

By Mr. Simon:

Q. You spend a lot of money for advertising, don't you, Mr. Wall?

A. Yes, on a budget.

Q. Consistent with your size?

A. Yes.

Q. And isn't handling patterns, four lines of patterns, as a matter of fact, a form of advertising for you?

A. I would say it is a service.

Q. And isn't every service a form of advertising?

A. You might interpret it that way.

Q. Now, the only purpose of a pattern is to convey to the home sewer the idea or style which is represented by the markings on the paper the pattern is made of, is that right?

A. I believe for the explicit instructions that she follows to construct that garment. I might have missed your point.

Q. When a woman buys a piece of fabric she makes it into a dress and wears the dress; she buys a button and sews it on the dress and uses it?

A. Yes.

Q. The only reason she buys the pattern is because it gives her the style of the dress she wants to make, isn't that right?

A. Well, it gives her more than the style; it gives her the instructions for constructing the dress.

Q. Which is telling her how to make the dress?

A. Yes.

Q. And that is the only reason she buys it is because it tells her how to make the dress?

A. And provides a fit.

Q. Now, every four months, Simplicity Pattern Company gives you credit for all the old styles of patterns that you haven't sold, isn't that right?

A. That's right.

[fol. 121] Q. You don't return those patterns to them, do you?

A. I don't return the contents of the packages; I only return the envelope in which it was shipped.

Q. You return the envelope in which it was shipped so that they can check how many you had? But you throw away, or burn the patterns themselves?

A. Yes.

Q. And they give you 100 per cent credit for that, don't they?

A. Yes.

Q. At least two of your other pattern companies only give you 90 per cent credit, don't they?

A. That's true.

Q. But Simplicity gives you 100 per cent for every pattern you haven't sold at the end of the life of the style.

Mr. Smith: That isn't correct, your Honor.

Mr. Simon: I am asking the witness.

Hearing Examiner Pack: Let Mr. Wall state whether it is true or not.

Mr. Smith: The contract there states what they give him credit for, and it speaks for itself and I object to going over the contract.

Mr. Simon: Mr. Smith went clear through the contract and said didn't it say so and so, and I didn't object.

Mr. Smith: The contract says here what he gets credit for, for discards only.

Hearing Examiner Pack: If Mr. Wall wishes to have the contract before him when he answers he may do so.

Mr. Smith: I want him to, because the question propounded is misleading and contrary to the contract. The contract only says he is entitled to credit for discards.

Mr. Simon: I object to Mr. Smith's statement, which is contrary to the fact.

Hearing Examiner Pack: What was the last question, Mr. Reporter.

(The reporter read the question as follows:

"Question: But Simplicity gives you 100 per cent for every pattern you haven't sold at the end of the life of the style!")

[fol. 122] Hearing Examiner Pack: You may answer the last question, Mr. Wall, if you can. And if you wish to refer to the copy of the contract, you have it before you and you may do so.

The Witness: They give 100 per cent on all discards except transportation. We pay that.

By Mr. Simon:

Q. Mr. Wall, four times a year—rather three times a year, every four months, certain styles are considered obsolete and taken out of the catalog?

A. That is right.

Q. When that happens they give you 100 per cent credit for every one of those patterns you have on hand, and you throw the pattern away; is that right?

A. Yes, except for transportation.

Q. Well, they give you 100 per cent credit for what they paid, or rather what you paid them. In other words, if you paid them a thousand dollars for patterns, they would give you a thousand dollars worth of credit, and you just throw the patterns away?

A. Yes.

Q. Has anybody from the Federal Trade Commission ever interviewed you or anybody connected with your company so far as you know prior to December, 1954?

A. Not to my knowledge.

Q. The first time was when they came in in March or April, is that right?

A. That is right.

Q. Now, you get previews, don't you?

A. I do.

Q. Prior to January, 1954, your store was getting 1500 previews during the peak seasons and 1,000 in the other parts of the year, is that right?

A. I think you are correct.

Q. And when the salesman came around to see you in January of 1954, you said you would like to cut him to 1,000 a month, didn't you?

A. Yes, I think that's correct.

Q. And the company cut them to what you wanted; no argument at all?

A. No argument.

[fol. 123] Q. And in the Spring you said you wanted to increase it back to 1,500 for the peak seasons?

A. I think I did for peak seasons.

Q. And that was wholly voluntary on your part?

A. Yes.

Q. I take it the reason you increased your preview order from 1,000 a month to 1,500 a month was because you thought the previews were good advertising for you?

A. Yes, I considered them necessary.

Q. Necessary to selling fabrics and patterns and everything that goes with it, is that right?

A. Yes. As long as the competitors have them I have to have them too.

Q. Don't they help to sell the fabrics?

A. I think they do.

Q. Now, in the two years you have been in this business, hasn't Simplicity always treated you fairly, and even, in fact, generously?

Mr. Smith: I object to that question. It calls for a conclusion and has no relevance whatsoever.

Hearing Examiner Pack: I think it is very general, Mr. Simon. Did you have in mind any particular point?

Mr. Simon: Well, the statute talks about the word "unfair" and I would be happy to phrase it the other way, but to use the statutory word "unfair," Mr. Wall, since you have been in this business, in your opinion, has the Simplicity Pattern Company treated you unfairly?

Mr. Smith: Just a moment, before you answer that, Mr. Wall. I object to that question on the same ground that I objected to the other.

Hearing Examiner Pack: Yes, I think that is too general, Mr. Simon. Objection is sustained.

By Mr. Simon:

Q. Mr. Wall, have you been a very consistent slow payer of your bills?

A. I should say that we were very slow for the first year or so that I went into that business.

Q. It got worse the second year, didn't it?

A. I thought it improved the second year.

[fol. 124] Q. Well, isn't it—

A. We just wound up the second year and I think Dun and Bradstreet or any rating firm have put us on a far more—

Q. I am interested in how you paid your Simplicity bills. This summer didn't you owe Simplicity as much as \$1,000 at one time?

A. Might have.

Q. And that \$1,000 represented your purchases over a period of eight or nine months, didn't it?

A. No, I don't think it was that many months.

Q. About how many dollars worth of patterns were you paying for, or rather buying a month?

A. Well, again I don't have that breakdown, but I don't believe that bill ever went over three months in arrears. It might have.

Q. Were you buying \$330 worth of patterns a month?

A. I don't know.

Q. The fact is, I think you will find, Mr. Wall, that the \$1,000 was for eight or nine months of patterns.

Mr. Smith: I object to that question, because Mr. Simon says "The fact is," he thinks. He cannot testify.

Mr. Simon; I withdraw the question.

By Mr. Simon:

Q. Mr. Wall, in the last twenty months, isn't it true the Simplicity Pattern Company had to send you sixteen collection letters?

A. They have sent a number of collection letters; I don't know how many.

Q. Do you dispute that it is 16 collection letters in 20 months?

A. I don't dispute it; I don't sanction it either; I don't know.

Q. That is approximately right?

A. I have had a lot of them.

Q. That is the approximate amount?

A. I would say it is a fairly good guess.

Q. And earlier this month, there was one bill of \$50.20, that was long passed due, and you sent them a post-dated check for \$50.20, didn't you?

A. No, sir.

Q. You didn't?

A. No, I sent them a check. It was not postdated, and it was in the mail before I got the last notice.

[fol. 125] Q. Didn't you send them—you are certain you didn't send them a postdated check?

A. I never sent anybody a postdated check.

Q. I show you a document I will ask the reporter to mark Respondent's Exhibit 13 for identification.

(The document referred to was marked Respondent's Exhibit 13, for identification.)

The Witness: Your Honor, may I confer with counsel?
Hearing Examiner Pack: Off the record.

(Discussion off the record.)

Hearing Examiner Pack: On the record. At the time we went off the record we had under discussion a certain check which Mr. Simon stated was a postdated check, or at least that was implied by his question. Mr. Wall had stated, I believe, that he had never given a postdated check. It seems to the Examiner that the matter is of no particular consequence one way or the other.

Mr. Simon has also stated off the record that he had no intention by bringing the matter up to embarrass Mr. Wall, and now I understand Mr. Wall's statement to be that he is not so sure about whether the check in question was postdated or not; that it might have been, is that correct?

The Witness: I would like to see the check. It hasn't been presented and I am not familiar with it. If one shows up maybe I will have some explanation for it.

Hearing Examiner Pack: Mr. Simon, you had the check marked for identification or were about to do so, as Respondent's Exhibit 13.

Mr. Simon: Shall we go ahead and put it in the record?

Hearing Examiner Pack: Will you just show it to Mr. Wall, please. He wants to see it.

Mr. Simon: Will the record show I am showing the witness Respondent's Exhibit 13 for identification.

Mr. Smith: Your Honor, I think this check ought to be [fol. 126] shown to the witness off the record in view of your ruling that the check has nothing to do with it. The witness just said he wanted to see it.

Hearing Examiner Pack: I believe Mr. Wall wanted to see the check and possibly make an explanation in regard to it.

The Witness: This check is dated 10/13.

Mr. Simon: You mean October 13?

The Witness: Yes. Now, I would like some conclusive evidence of when you received the check.

Mr. Simon: I am asking you the questions, Mr. Wall.

The Witness: I am denying sending a postdated check. And this check is dated on the voucher attached to it, October the 13th. I would like to know when I presented the check.

Mr. Simon: I am asking you.

The Witness: Well, if you will give me an opportunity to go to my records and I will tell you the day that I mailed it.

Mr. Simon: I will give you that opportunity.

The Witness: We have never, in the two years I have been there sent anybody a postdated check for as much as one day even.

Mr. Smith: Your Honor, if Mr. Simon later on wants to call Mr. Wall as a witness about that check, he may do so, but I am not going to send him way out to his store and back down here after checking his records.

Hearing Examiner Pack: I don't understand that Mr. Wall has been asked to return to the witness' stand at all.

Have you anything further in connection with this check, Mr. Simon, or can we go on with something else?

Mr. Simon: One more. Are you prepared to say yes or no to whether the check of which you hold the stub was not dated November—

Mr. Smith: Before you answer that—

Hearing Examiner Pack: Let him complete the answer first. Go ahead, Mr. Simon.

Mr. Simon: Are you prepared to say the check of which [fol. 127] you hold the stub in your hand was not dated November the 7th, 1955?

The Witness: The check says November the 17th.

Mr. Simon: That is the stub which is presumably the day it was issued. Are you prepared to tell me the date on the check, or the top half of the check was not dated November 7th, 1955?

Mr. Smith: Your Honor, if I understood your ruling the testimony about this check was ruled out.

Hearing Examiner Pack: No, sir; I did not. I had not ruled the testimony out, Mr. Smith. We were simply discussing the matter off the record, and I was trying to work out some solution of the problem whereby Mr. Simon could establish what he considers to be necessary in the record, and at the same time avoid Mr. Wall any embarrassment.

I believe the Respondent's Exhibit 13 for identification is not a check then, it is a stub, is that right, Mr. Simon?

Mr. Simon: Yes. Apparently this company has a check system in which the man to whom it is sent to retains the

bottom half and deposits the top half in the bank, and, of course, we deposited the top half and this is the bottom half which we retained.

The Witness: This is dated October the 13th. Now, I want you to show me or tell me what date was on the check itself and when it was presented.

Mr. Simon: I am sorry, Mr. Wall, but I ask you the questions. My question is whether you are prepared to say that the check to which that is attached was not dated November the 7th, 1955?

The Witness: Yes, I am prepared to say.

Mr. Simon: Was it?

The Witness: Let me get my records and find out. I don't carry that in my head. I deny sending a postdated check until I have it proven to me that one got in the mail by mistake.

[fol. 128] Mr. Simon: I have no further questions about the check, Judge, and a little while ago, when we were off the record, Mr. Wall started to make a suggestion, and I said that anything he was going to say should be on the record. And I would like to give him the opportunity on the record to make the statement he started to make off the record.

Hearing Examiner Pack: Do you have any further statement to make about this matter, Mr. Wall?

The Witness: Well, Your Honor, what I hoped to keep off the record was the fact that I, as a small merchant, am representing small merchants all over the country that are operating under the same agreement with Simplicity that I am.

The slow credit for my concern is no reflection on me. A deficit was incurred before I went there and I have wiped it out. But to bring all this to light in the trade journals and with the credit associations is going to seriously impair my business, and make me as an individual suffer for all the other stores in the country. And I would like for it to be kept out of publication.

But my credit compared to somebody in California or Maine or someplace else, I cannot see the bearing on it because Simplicity reserved the right to cut off my credit any time they saw fit. And they never saw fit to do so.

Mr. Simon: They carried you all during this two year period.

The Witness: You carried me and I appreciated it and I wrote you a letter of thanks for it and told you I was getting on my feet and that the business was not operating profitably. I have no kick on that. My objection is the fact that all this conversation is going to every credit association in the United States, and it is going to hurt me as an individual when I am here to represent, I suppose, all the privately owned stores in the country.

Mr. Simon: Judge, I move to strike from the record his [fol. 129] statement that he was here to represent all the privately owned stores in America.

Hearing Examiner Pack: The motion is denied. I am going to leave Mr. Wall on the record just as he had made it. Of course, Mr. Wall, your present statement will appear on the record just as the other testimony will appear. And it may be that your statement will serve the purpose you had in mind, that is, offering something in the way of explanation as to the point of your being behind at times in the payment of your bills.

I don't see anything further to be done on this particular matter, gentleman, unless there are further questions of Mr. Wall or Mr. Wall has further statements I suggest we go ahead.

Mr. Simon: I have no further questions, Your Honor.

Hearing Examiner Pack: Mr. Smith, do you have any re-direct?

Mr. Smith: Yes.

Re-direct.

By Mr. Smith:

Q. Mr. Wall, you made a statement back in the testimony, in response to a question Mr. Simon asked you; whether or not your store had been hurt. I think he used the word "hurt" by reason of Woolworth's competition.

Mr. Simon: I object to that because that is not what I said.

Mr. Smith: What did you say?

Mr. Simon: I asked this witness whether although he would like to get a lower price, whether he was hurt com-

petitively by the fact that Woolworth got better terms than he got, and he said no, he was not hurt by that fact.

Mr. Smith: What did you mean by hurt, Mr. Wall?

The Witness: I mean that the cost of the item had nothing to do with the number of units that either store [fol. 130] sold. What I paid for it and what Woolworth paid for it, or anybody else, has no reflection on how many are sold to what customers or when.

By Mr. Smith:

Q. Is that because these patterns are fair traded, they all sell at the same price every where else?

A. That is correct.

Q. So that you meant it made no difference as to what the cost was when you compared Woolworth to your company, because the retail price was the same?

A. It makes no difference to the customer what it cost the dealer.

Q. That is what you meant by that testimony?

A. Yes.

Q. Mr. Wall, I have one further question to ask you, and that is whether or not on this last Friday, Mr. Simon and this representative from Simplicity Patterns had any conversation with you or tried to represent to you, or contend with you that Woolworth's next door to you, was not in competition with your store?

There was a question of competition discussed between you and Mr. Simon and the representative of Simplicity regarding the competition of Woolworth's?

A. Yes.

Q. Will you tell us what that conversation was?

A. Not verbatim. But they suggested that having Woolworth's next door to me was an asset. And that their selling patterns did not reflect on the number of patterns that I sold.

Q. I didn't hear you.

A. That the number of patterns sold by the Woolworth's did not reflect on the number of patterns that I could sell.

My reply was any pattern they sold was in competition to my offering the same pattern for sale.

Hearing Examiner Pack: What Mr. Smith asked you, what your impression was, and you may state what it was and then state the basis for the impression. [fol. 131] What they said to you, in other words, that gave you that impression.

The Witness: Well, one of the two men commented that it was their opinion that being next door to a Woolworth Company was an asset. I agree that having a Woolworth Company next door to me was an asset, except for the fact that they carried a pattern which was in direct competition with me.

OSCAR MERBER, was thereupon called as a witness for the Commission, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. Mr. Merber, you have given the reporter your full name?

A. Yes, I have.

Q. And your address?

A. 1415 Tuckerman Street, Northwest, Washington, D. C.

Q. Mr. Merber, you are in business in Washington, D. C., are you not?

A. Yes, I am the President and Secretary of the Yard Stick, Inc., which is a business in Washington, D. C.

Q. Where is that?

A. 928 F Street, Northwest, and we also maintain and operate a store which is wholly owned by the corporation, on discount fabrics at 615 7th Street, N.W.

Q. When did you open up the 7th street store?

A. The store on 7th street was opened on September 6th of this year.

Q. And does it go under the name Yard Stick too?

A. No, it goes under the name of Discount Fabrics.

Q. Do both stores handle the same type of merchandise?

A. No, sir. The store on F handles exclusively drapery

and slipcover fabrics, as of September 6th. And the store [fol. 132] on 7th street handles both drapery and slipcover fabrics and in addition to that, dress materials of all kinds and varieties.

Q. Up until the time you opened up the 7th street store, did the F street store handle patterns?

A. Yes, sir; it did.

Q. Do both stores now handle patterns or just one?

A. Just the 7th street store.

Q. That is as of September 6th?

A. September 6th of this year, that is correct.

Q. Now, we come down to Service Simplicity Counter Catalogs. Did the Yard Stick pay for them?

A. Oh, yes.

Q. The numbers shown there you have got each month is that correct?

A. Yes.

Q. Do you remember what the cost of them were?

A. No, but to the best of my knowledge, and this Exhibit 25-b, refreshes it, it was \$1.25 for each book.

Q. Right below that is the number of catalogs, right?

A. Right.

Q. They were paid for too, were they not?

A. Yes.

Q. Now, a little further it goes into the question of pattern cabinets, and it lists certain of their cabinets. Now, the contract which says "above figures" that is referring to the pattern cabinets in equipment?

A. That is right.

Q. On a rental basis, five per cent per annum, and upon termination of service agreement to be returned prepaid to Niles, Michigan, right?

A. Yes, upon termination of service all fixtures to be returned prepaid to Niles, Michigan.

Q. That means returned to the Simplicity Pattern Company factory now in Michigan, does it not?

A. That is correct.

Hearing Examiner Pack: You were reading from which exhibit there?

Mr. Smith: 26-b.

[fol. 133] By Mr. Smith:

Q. That means, you understood that to mean, the title to those cabinets remained in Simplicity while you paid five per cent per annum as rental or interest, is that right?

A. That's right.

Q. You still have those cabinets?

A. I believe we have all the cabinets with the exception of one which was my recollection turned to or back to Simplicity at or about that time, and proper credit was received on the return of the cabinets.

Q. Now, the Yard Stick, prior to this date of September, transacted all its business from the F street store, is that correct?

A. That is correct.

Q. And they handled dress materials, patterns, yard goods, as they call it, rather than dress goods; and notions, did they not?

A. All of those things with the exception of the fact that our notions were to have been, or were to be handled in a very limited extent.

Q. Now, when you moved down to 7th street, you moved the patterns down there, did you not?

A. Yes.

Q. You opened up the 7th street store?

A. Yes.

Q. And do you sell notions in the 7th street store now?

A. With the exception of thread, we sell no notions whatsoever in the 7th street store.

Q. Do you know what volume of Simplicity Patterns were sold by the Yard Stick during a year?

A. I will be very frank with you; I haven't the slightest idea.

Q. Now, the Yard Stick is an independent store, isn't it,

A. Yes, sir.

Q. It is not a member of a chain?

A. No, sir.

Q. Around on 7th street there are two stores, one operated by F. W. Woolworth Company and that is at 406 7th

street, and another one operated by McCrory at 826 7th street, N. W., is that right?

A. That is right.

Q. In your opinion, is the Yard Stick, that is, speaking of both its F street and 7th street stores, in competition [fol. 134] with the Woolworth and McCrory stores on 7th street in the sale of patterns and notions?

A. Frankly, not to any serious extent, because neither of those stores handles the comprehensive line of fabrics we do.

Q. I didn't mean fabrics. I said Patterns.

A. Yes. You see my point is this. Patterns are necessary adjuncts to fabrics. Without patterns in the store one could not attempt to sell any fabrics for home sewing. On the other hand, there are classifications of fabrics running from the very popular or low priced items, which are handled only by the 5 & 10 cent stores, running on up to better fabrics, which are handled—medium priced and better—which are handled by the normal independent store. And then on up into certain more high maturities.

As a practical matter, if a customer were to think in terms of buying a pattern, strictly by itself, then in that sense, strictly speaking, I think you would be right in saying we are in very definite and positive competition with any other store that handles either the same pattern or any other pattern.

On the other hand, if you are talking of sincere and genuine and meaningful competition, where it affects dollar and cents wise of a business, I honestly and sincerely don't believe that a 5 & 10 cent store, regardless of how much business they do presents any competition to an independent store, or vice versa. Or that any independent store presents competition to 5 & 10 cent stores.

Q. You were speaking of competition generally?

A. I mean even for a store, for example, I will exemplify. In our 7th street store we are two doors away from Singer Sewing Machine, which handles a pattern department. They do not handle Simplicity patterns in that particular store.

Frankly, they are handling that pattern as an aid and an assist to us rather than a hindrance, because we find—

Q. Is that Singer you are talking about?

A. Yes, the Singer Sewing Machine. Because we have found in our experience, although we weren't quite sure [fol. 135] of what would happen when we started in, but we found in our experience that the fact that Singer Sewing Machine has a comprehensive line of patterns even though it is only one company, that is the McCall Corporation, that that very fact assists us because they are near us so that if a customer is looking at some materials and is then seeking a pattern for it, and if we don't have the right pattern, it is very simple to say "Well, right down the block is a store which handles patterns" and it helps to clinch the sale.

Q. Well, is there any way that you know that they would go to your store?

A. I am sorry, I don't understand your question.

Q. Is there any way you would know that they had come to your store for a pattern?

A. That the customer would come back to our store?

Q. If he bought the pattern at Singer's, how do you know he would come to your store to buy the goods?

A. There is no certainty, sir, for this reason: Especially because Singer Sewing Machine people handle a line of fabrics and materials by the yards, which they sell from samples. But the likelihood is if they were two doors away and were seeking fabrics and bought a pattern in order to make a foundation for that, the likelihood is that they would come into our store to at least look and see what we have.

Q. Well now, do you consider yourself in competition with the McCrory's store and Woolworth's store in the sale of patterns?

A. In the sale of patterns directly, I believe, frankly, that we are and must consider ourselves in some competition in so far as they having the same patterns as we, but a customer does not come in our store expressly for the sole purpose of buying a pattern.

In our own experience, she comes in to buy material primarily, and the pattern is simply a necessary adjuvant. I call it a necessary evil to the conduct of our business.

Q. You recall talking to me, I think it was Monday, a week ago, on a rainy day that I visited your store?

A. Yes.

[fol. 136] Q. And do you recall my asking you what competition you had, or if I didn't put it that way, that I mentioned the Woolworth and McCrory stores on 7th street—

Mr. Simon: I object to the question as leading.

Mr. Smith: I am asking him if he recalled that conversation.

Mr. Simon: He can ask him what the conversation was, but this is direct examination and he can't ask leading questions.

Hearing Examiner Pack: I think, Mr. Simon, that counsel may, at an inquiry of this kind, at least direct the witness' attention to some particular point in an alleged conversation. Objection is overruled. I believe the question is just "do you recall that conversation" with Mr. Smith?

The Witness: Yes, I do recall that conversation.

By Mr. Smith:

Q. Do you recall telling me at that time that in your opinion the F street Yard Stick store was in competition, or had been in competition with the Woolworth and McCrory stores on 7th street in the sale of patterns, and that since your Yard Stick opened up its new store on 7th street that that store was still closer to the Woolworth and McCrory stores, and that that store was in more competition. Do you recall that?

Mr. Simon: I must object to this as testifying for the witness, and not cross examination, or direct examination.

Mr. Smith: Do you recall that testimony, sir?

Hearing Examiner Pack: Objection is overruled. You may answer, Mr. Merber.

The Witness: I don't think the conversation was to that effect. Rather the conversation concerned whether or not we were in competition in any way with any of the 5 & 10 cent stores, and I agreed with you then, and I agree with you now, that we are necessarily in competition with anybody that has for sale the same thing we have for sale on [fol. 137] counters of our stores, whether they are one block away, or five miles away.

I will agree with you further, the fact that we pointed out that in the 7th street store that there was the possibility that we might be in a little further competition with the 5 & 10 cent stores for the reason they were nearer to us physically down there than they were in our store on F street.

Mr. Smith: Then is it your testimony now that your 7th street store is in competition or is not in competition with the Woolworth and McCrory stores?

Mr. Simon: That is the third time that question has been asked, Judge.

Hearing Examiner Pack: Answer the question.

The Witness: I think, strictly speaking, we would have to say that the store is in competition with the 5 & 10 cent stores. But the only question is what is the extent of the competition; that is simple to answer.

By Mr. Smith:

Q. Well, what is the extent? You are the best judge of that.

A. Yes. The extent of the competition is very negligible.

Q. You mean in the sale of patterns and merchandise it is negligible for the simple reason that the average customer who will buy fabrics from a 5 & 10 cent store is not a customer of discount fabrics and has never been a customer of Yard Stick?

A. Our price ranges are completely different.

Q. Not on patterns?

A. On materials. And therefore we attract a different customer. Pretty much the average rather the maximum price that you will have in the average 5 & 10 cent store on fabrics runs about 39 cents a yard. And the prices in our store at Yard Stick start at 59 cents and go up.

In Discount Fabrics we have one counter of possibly—which is less than one quarter of one per cent of all our [fol. 138] merchandise—below the 39 cent a yard price. Everything else is 39 cent and up.

Q. When I asked you what was the extent of the competition I wanted an answer from you as to—

Mr. Simon: I object to this argument with the witness.

Hearing Examiner Pack: I see no serious objection to this. Go ahead, Mr. Smith.

By Mr. Smith:

Q. As to merchandise. That is what I mean by the extent. What happens to merchandise? What is the extent merchandise is weighed in your competition?

A. It would be very hard to answer specifically. I will try my best. I don't know exactly how much business we do in the patterns. But the volume of business that we do in patterns is very small. It is possible that the fault in that respect may be due to the manner of operation of the store. When we had patterns in our store on F street our patterns had to be in our downstairs department because of the space limitations, and it was difficult to get customers to walk downstairs for a pattern.

In that result patterns came to be sort of a stepchild. The same happened with many notions, so that from the standpoint of normal conduct of the store, our store, the Yard Stick, Inc., probably did about one-fifth of the volume of business in patterns and notions that a normal store doing the same volume of fabrics business would do.

That was one of the reasons in fact for our having abandoned all dress fabrics and patterns and notions in our F street store as of September 6th of this year.

Now, on 7th street, our experience there is still too new for use to be able to venture an exact opinion. But thus far, based upon the total volume of business we are doing, it would seem to me our pattern business is somewhere around, or some where under \$25.00 a week. And that is all [fol. 139] around, between Simplicity, Advance, and McCall. All three patterns of which we have in that store. So that it becomes a very negligible fact in the conduct of our business.

Q. When you and I were talking in your store, more than a week ago, I think it was, at which time—did I give you your subpoena at that time?

A. Yes.

Q. Do you have your subpoena with you?

A. Yes, I turned it over to the Judge.

Q. When I asked you about competition with the ten cent stores on 7th street, did you—I will ask you whether or not you told me this: Did you tell me yes, you are in competition with them, with the qualifications you are mentioning now?

A. Well, I wouldn't attempt to reconstruct my exact

words. I do recall the time you were in, our conversation was rather hasty. I don't think our conversation was at variance with that which my testimony is now. At that time, in fact, I had one other man waiting for me downstairs. And I think I was interrupted to answer the telephone not less than ten times in fifteen minutes, which could have been a maximum time devoted for a conversation.

So that it would be difficult for me at this point to reconstruct what my conversation was. But this I think was so. I think perhaps counsel, you are referring to this: I told you at that time, and I still believe it, that in my opinion if it is possible for the Yard Stick or Discount Fabrics to buy any item of merchandise, patterns or otherwise, at the same price as any other user, regardless of how big they may be, that the Yard Stick and Discount Fabrics would strive, of course, to accomplish that result.

Because common sense and good business would dictate that to our best interest. And I for one am not happy about having to pay more for, for example, than the next fellow does for the same item.

Q. Well, what do you have reference to?

A. I have reference, for example, to the question of [fol. 140] freight charges, which are apparently an issue in this proceeding. On the other hand, I can not live without a pattern department. And the amount to us in our whole picture is so trivial that it is not something I would attempt to raise any great issue, or to make any great complaint. I think it is what you lawyers call de minimus non curat lex.

Counsel, I practiced law nine and half years before the war in the state of New York, and that is one phrase which remains with me from my law school days.

By Mr. Smith:

Q. Does the Yard Stick make any profit off the sale of patterns?

A. No, sir; they do not, and never have, and neither does Discount Fabrics.

Q. After I talked to you, did Mr. Simon and some representative of the Simplicity Company come in your store and talk to you?

A. Mr. Simon and Mr. Pullman.

Q. When did they call on you?

A. I believe it was last Thursday.

Q. Well, what impression did you get as to the purpose of presenting their case to you?

A. Well, Mr. Smith, I look at the sample lines of possibly—I might answer that question by making that comparison. I look at the sample lines of approximately one thousand different salesmen each and every year in the course of doing business. If not a thousand different salesmen, on a thousand different occasions. Each one of these salesmen presents their line as being the best line, or tries to present the most cogent reasons why I should handle his line.

I think that if these men came to see me that must have been their intention, to present their case in the strongest light to me to see if I wouldn't agree with them.

[fol. 141] Q. Now, going to 7th street, within a matter of three or four blocks of your store there is a Woolworth, H. L. Green, a G. C. Murphy, a McCrory, and S. S. Kresge's, is that right?

A. Yes, sir.

Q. And two doors away from you is the Singer Sewing Machine store that sells patterns?

A. Yes.

Q. And about four doors from you is the Hecht store, is that right?

A. Half a block away.

Q. Would you estimate that the Hecht's Company at that distance of a half a block away probably sells perhaps a million dollars worth of fabrics a year?

A. They do over that.

Q. Over that. And you are in business on 7th street to sell fabrics?

A. Yes.

Q. So, they are your real competitor, aren't they?

A. In fabrics, Hecht's, Lansburgh's, Kann's, are our major competitors.

Q. And if I remember your testimony right, patterns are merely a necessary evil to sell the fabrics?

A. That's right, sir.

Q. If you could sell fabrics without patterns, would you carry patterns?

A. Never in a million years.

Q. And if you could get somebody next door, whether Woolworth, Kresge's, or anybody else to sell the patterns, would you be happy for them to have it?

A. I would share half of their rent, probably, but I would encourage it.

Q. You would be happy to have McCrory and Woolworth on either side of you selling patterns, would you not?

A. Very definitely.

Q. When a woman comes into your store for a pattern, did I understand you are perfectly happy to have her go to Singer's and buy the pattern?

A. Yes, sir; we are. It does not pay us as a question of time, to have a young lady or a young man or a sales clerk spend the time that is necessarily taken up while the customer is looking at the pattern book, and help advise her and then finally make the sale of a pattern, write up a ticket [fol. 142] for 25 cents, plus a penny for tax, ring it through the register and make the change. It just doesn't pay financially.

Q. In other words, your type of business operation just doesn't fit selling 25 and 35 cent items?

A. Ours is a volume operation and we can not possibly exist on sales of less than \$2.50.

Q. But the ten cent stores, if we may use that term, although they are no longer ten cents, are geared to the 25, and 35 cent type of sale?

A. I think that's correct.

Q. Therefore, they can make a profit out of a level of sales that are unprofitable to you, is that right?

A. Without a question of a doubt.

Q. Now, in your store on F street you carry three lines of patterns?

A. Yes.

Q. Simplicity, Advance and McCall, is that right?

A. Yes.

Q. Did the volume of business in patterns warrant carrying three lines, the volume of patterns?

A. No, we consider it necessary service for our cus-

tomers. The store did over a quarter of a million dollars a year in fabrics, for the most part in dress materials alone, and we found after experimentation, that customers would not buy the fabrics from us readily unless they had access to the patterns.

Q. You carried three pattern lines as distinguished from one, not because you had enough business to warrant it, but because you wanted to give the maximum service to your fabric customers?

A. That is correct. Well, I think, counsel, that is not a hundred per cent correct. We would have preferred to carry only one pattern line, but we found that it was such a loss that we tried to minimize our loss by spreading it over three companies rather than just one company.

Q. You said you preferred to carry one line. I take it you prefer to carry none?

A. We prefer to carry none actually, but if necessary, one. But we found that it was easier to spread a loss with three companies than one.

[fol. 143] Q. Now, when you carry these patterns, every four months, three times a year, certain styles are discarded, is that right?

A. Yes.

Q. And the Simplicity Pattern Company gives you 100 per cent credit for all your inventory of those discarded patterns, is that right?

A. That is correct.

Q. And you return merely the envelope so they can count them, but actually throw the patterns away?

A. We do.

Q. Now, last year in 1954, it is approximately accurate that your total purchases from Simplicity were \$923. and they gave you credit for \$573. of patterns that you threw away, discards, and you paid them \$359, is that approximately accurate?

A. That would be approximately accurate. I do not know the actual figures.

Q. So that for every dollar you paid Simplicity for patterns last year, they gave you full credit for a dollar and a half of patterns that you threw away?

A. Well, I'm not sure I can follow you on the definite conclusion, but the figures you stated were correct.

Q. If you made payments to them of \$359 in cash, and they gave you credit for \$573—

A. Then they gave us 150 per cent credit on our payments.

Q. The credit was 150 per cent, of the amount you paid them? A. Yes.

Q. So for every pattern you paid for, you got two and a half patterns?

A. Roughly speaking.

Q. That couldn't possibly be a profitable account for the company, could it?

A. That I do not know, but it certainly was not very profitable for the Yard Stick.

Q. Simplicity does a lot of work in the schools, advertising in the schools, don't they?

A. Yes.

Q. Without going in detail is that a substantial advantage to every merchant in the community selling fabrics?

A. Oh, yes.

Q. Now, when you moved from F street to 7th street, did [fol. 144] Simplicity agree to transfer the account from one store to the other?

A. Yes, sir; they did.

Q. Did the other two pattern lines agree to do the same?

A. Advance Pattern Company agreed. The McCall Pattern Company did not agree.

Q. So that you no longer have a McCall line, is that right?

A. We carry the McCall line because they wouldn't take it back from us for full credit and we are just selling it down, but not reordering anything from them.

Q. And they refused to let you do that?

A. That's right.

Q. Do you know whether the McCall Pattern Company has publicly announced that they are cutting out all the marginal stores and just going to concentrate on the more profitable stores?

Mr. Smith: I object to that as being irrelevant and immaterial.

Mr. Simon: He said he carried McCall's.

Mr. Smith: I don't care if he did.

Mr. Simon: I was addressing the court. He said he carried McCall's Patterns and that they refused to transfer

the account. And I asked him if he knew that was because they were cutting out all their marginal customers.

Mr. Smith: I object; that is immaterial and irrelevant.

Hearing Examiner Pack: Is it your position that this also has to do with the issue of competition, primarily, in the case.

Mr. Simon: Yes.

Hearing Examiner Pack: And you are asking Mr. Merber—

Mr. Simon: Whether he is familiar with the fact that McCall Company publicly said they were cutting out their marginal accounts.

Mr. Smith: I don't know what a marginal account is.

The Witness: Actually, I know nothing about the ruling. [fol. 145] By Mr. Simon:

Q. Are you familiar with the fact that the annual statements for the McCall Company for 1953 and 1954, their published annual statements say that they are cutting out their marginal accounts?

A. Mr. Simon, I know nothing about it, actually.

Q. I have no further questions.

Redirect examination.

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Now, it seems to me important in this case as to who told who what. Prior to February 23, 1955, had you discussed the matter of terms that the Simplicity Pattern Company charged you with anybody from the Federal Trade Commission?

A. I don't believe that I ever discussed it prior to February 15, 1955.

Q. That is the date Mr. Horne came to see you?

A. I am not positive, but I don't recall any conversation before that time.

Q. When he came to see you, did he tell you Woolworth's was getting these great big benefits and try to inflame you against the company?

A. Counsel, no, I don't think it was a question of inflammation. But by recollection of the conversation at this time, as Mr. Horne pointed out to me, that the Woolworth chain

was getting a better break price wise in view of the transportation question.

Q. And you didn't know it before then, did you?

A. I was not actually conscious of it before then.

Q. Have you ever felt your business was in any way hurt by the fact that Woolworth's and McCrory and other people were selling patterns down there?

Mr. Smith: I object to the word "hurt." It is too indefinite and vague. I can be hurt in a million ways, or not hurt.

Mr. Simon: He knows what I mean.

Hearing Examiner Pack: I am not sure of the question. Was it completed?

[fol. 146] The Reporter: Yes, sir.

Hearing Examiner Pack: Will you read it and see if we have the whole question?

(The reporter read the question as follows:

"Question: Have you ever felt your business was in any way hurt by the fact that Woolworth's and McCrory and other people were selling patterns down there?")

Hearing Examiner Pack: Does that complete your question?

Mr. Simon: Yes.

Hearing Examiner Pack: Objection is overruled. You may answer the question.

The Witness: No, our business was not hurt.

By Mr. Simon:

Q. And you would feel better if you got a lower price, but the price that Woolworth did get, that McCrory did get didn't hurt a bit, did it?

A. Yes, I think I should add to that the fact that something I recall further I think that occurred in the conversation that you and Mr. Pullman had with me, and it was this:

That I would much prefer we would be the only company in the entire city to carry Simplicity patterns so we would have an exclusive.

Q. But as long as there are going to be others selling

them; they help the sale of yard goods, and you would like to see Woolworth's sell them by the basketful, wouldn't you?

A. I wish they would.

Q. Thank you, sir.

Hearing Examiner Pack: Anything further, Mr. Smith?

Further redirect examination.

By Mr. Smith:

Q. You know, do you not, that ten cent stores wouldn't sell items unless there was a profit in them, you know that?

A. That is a matter of common knowledge.

[fol. 147] Q. It is a matter of common knowledge. They don't sell any other item just to support—they don't sell one item in order to support another item, do they?

A. Not to my knowledge.

Q. So the result is while the ten cent stores, everything is sold at a profit or else they will cut it out?

A. I believe that is right.

Q. Your store has to sell patterns at a loss?

A. That is right, sir.

Q. That is all.

Further recross-examination.

By Mr. Simon:

Q. If you get the same terms as Woolworth's you may not lose as much money, but you would still be losing money on patterns?

A. Oh, yes, the transportation charges are not very large.

Q. The catalogs and everything added up would still merely reduce the loss somewhat?

A. I believe that is a fair statement.

Q. That's all.

ROBERT BRUCE DOTSON, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. Your full name?

A. Robert Bruce Dotson.

Q. And you live in Bethesda?

A. Yes.

Q. You are the President of Bruce Stores, Inc.

A. I am.

Q. And your store is located in Bethesda, Maryland?

A. Yes, it is.

Q. What kind of stores are the Bruce Stores, Incorporated?

A. It is a variety store, a glorified 5 & 10 cent store.

[fol. 148] Q. An independent store then; not a chain store?

A. No, sir, not at all.

Q. And you get the number of catalogs issued there on the counter catalog?

A. Yes, one each month.

Q. How much do you pay for them?

A. \$2.00.

Q. That is, \$2.00 each?

A. Yes.

Q. Now, in Commission's Exhibit 29-a, it appears you bought a cabinet for \$150., and provides for installments of \$15, payable every six months?

A. That is right.

Q. You pay them?

A. That I do.

Q. Tell us something about—you say you run a variety store. Tell us about some of the things you sell in there. Is it comparable to the 5 & 10 cent store, the type of merchandise you sell, is it on about the same level, or the same type as the ten cent store?

A. Yes, I was with a chain before, and I patterned this store after the chain with which I was associated.

Q. What chain were you with?

A. J. J. Newberry Company.

Q. You were with them for—

A. Seven and a half years.

Q. What capacity were you with them.

A. Both Assistant and Manager.

Q. That is of the store?

A. Of two stores.

Q. Where was that?

A. Originally with the one in Pennsylvania, Lansford, and the store that I left to open up here was in Saratoga Springs, New York.

Q. So, the items you run in your store are patterned comparably to what is generally sold in a 5 & 10 cent store?

A. Allowing for some local grading up in toys; the rest of it is comparable.

Q. About the same line of goods?

A. Same manufacturers.

Q. Same manufacturers?

A. Yes.

[fol. 149] Q. How long has Bruce Stores been in business there at 6992 Arlington Road, Bethesda?

A. Two years. Two years in December.

Q. Do you sell any kind of patterns other than Simplicity?

A. Yes, I sell Butterick.

Q. Do you consider yourself in competition, your store, in competition with chain stores?

A. Yes, sir; I do.

Q. Ten cent stores, I mean?

A. Very definitely.

Q. What about the Woodworth store located at 7207 Wisconsin avenue?

A. I consider them my main competition.

Q. Main competition?

A. Yes.

Q. Do you know whether or not they sell patterns over there at Woolworth's?

A. Yes, sir; they do.

Q. Do you know whether they sell notions or not?

A. That they do.

Q. Do you make any profit on the sale of patterns?

A. If we make a profit it is negligible. I haven't figured it out as far as net is concerned, but is not a profit item in our store.

Q. It is not?

A. No, that is per se; I mean the patterns themselves.

Q. You consider that you make a profit or don't?

A. Well, I would say it is pretty close. We may break even.

Q. You may break even. Now, you recall when I was out to see you, it was Friday a week ago, wasn't it, about a week?

A. I believe that's right.

Q. Subsequent to that time, did Mr. Simon here, you see this gentleman here?

A. Yes.

Q. Did he come by your office and see you?

A. Yes.

Q. Did he come by himself or did somebody come with him?

A. No, he came with Mr. Pullman.

Q. Mr. Pullman. Who did you understand Mr. Pullman to be?

A. He is the salesman for Simplicity in this area.

[fol. 150] Q. What day was it they came to see you?

A. I know it was on Friday, last Friday, Veterans' Day.

Q. Well, go ahead as near as you can and state what took place and what conversation took place. A. —

Then we were discussing competition in the immediate area. And we discussed the possibility of Woolworth's store being competitors for me; whether we served the same area or not. And we brought up the fact that any store that carried the same item that I do competes with

me, but I felt Woolworth's store came more duplicating my inventory than any other store in the Bethesda area, and since most of the people in Bethesda are government workers we are in a sense, competing with any variety store for that reason, and we have to maintain prices. I mean we have to meet the competition as far as prices are concerned.

We were discussing criterion and how you might determine whether a store is in competition or not. And I believe Mr. Pullman discussed the fact that it might be better for me if I were next door to a Woolworth store. He pointed out that a lot of chains located side by side as in Atlantic City and Asbury Park, but my own feeling on that is that it would be the death of the business if I were located next to a chain store, because an independent can not possibly carry the assortment, the inventory assortment that a chain can.

And that is the gist of the conversation. It was an educational program I suppose, maybe promotion work, I don't know.

Q. What about notions?

A. It is one of our best departments.

Q. Does Woolworth's sell notions?

A. They sure do.

[Vol. 151] Q. Your opinion is that there is a connection between the sale of patterns and notions?

A. Oh, definitely.

Q. Will you explain what the connection is?

A. Well, every pattern, I wouldn't say every one, because I don't know them all, call for thread, zippers, and that type of stuff. A woman buys a pattern and she checks the requirements on the pattern. And if the store carries those items on that pattern why she buys it. There is no two ways about it, it increases the sale of notions a hundred fold.

Q. Do you have any opinion that you could express on whether or not without the patterns or notions, sales would decrease or increase?

A. Oh, without patterns I think notions would be off, definitely.

Cross-examination.

By Mr. Simon:

Q. Mr. Dotson, you carry fabrics in your store, don't you?

A. A limited amount, yes.

Q. They come in bolts and you have the full bolt of the goods?

A. Not always; we buy remnants too.

Q. You also have bolts, basic stocks, I gather?

A. Yes, broad cloths.

Q. Corduroy and broad cloths?

A. Yes.

Q. I don't want to ask you for any figures that you don't want to make public, but your fabric business is bigger business than your pattern business, isn't it?

A. Our purchases to date on fabrics would approximate \$800.

Q. How long have you had them?

A. We have had them since the store opened, but I am talking about this current year.

Q. In 1954, you purchased from the Simplicity Pattern Company, excluding the initial stock, a total of \$506—

Mr. Smith: I object. Are you testifying?

Mr. Simon: I am asking him a question, if you don't mind.

[fol. 152] You purchased a total of \$506—

Mr. Smith: He is saying that on such a date this witness purchased this much money. Now it seems to me he is doing the testifying.

Mr. Simon: Of all the people who have no right to make that objection, Mr. Smith, it is you. Mr. Smith has been doing it all day and I am on cross-examination and he was on direct.

Hearing Examiner Pack: However the question is framed, it is a question directed to Mr. Dotson as to whether certain figures which Mr. Simon is reading is approximately correct.

By Mr. Simon:

Q. Is it approximately correct that you purchased \$506 worth of patterns from Simplicity in 1954?

A. Probably, yes.

Q. Then every some months four months, I believe, you throw away the discarded lines and they give you full credit for it, is that right?

A. Yes.

Q. And in 1954, did they give you approximately \$328 worth of credit for patterns you threw away?

A. I suppose. We got credit; I don't know the exact figure.

Q. That is approximately?

A. Yes.

Q. You paid them approximately \$178? The difference between \$506 and \$328?

A. Actually, I don't follow that reasoning. I sent them checks in the amount of \$500 and some dollars.

Q. My record here shows that the total purchases were \$506—

Mr. Smith: Your Honor, I object to this. This witness hasn't got his records which is obvious. And he is talking about what his records show and if he has the record I think he should offer them in evidence. I don't think it is fair to ask this witness to remember figures like that.

Hearing Examiner Pack: I agree with you, Mr. Smith. Certainly so far as exact figures are concerned. On the other hand it seems to me if Mr. Dotson does know [fol. 153] whether certain figures are approximately correct, he may so state.

Of course if he—

Mr. Smith: That is not what he asked him. He keeps telling him that such and such and so and so—

Mr. Simon: Let me make it clear I am not making any point on the precise figures. It is the approximation that is important to me.

Hearing Examiner Pack: All right. I believe you said, Mr. Dotson, that your recollection is you have sent Simplicity checks totaling about \$500 during this year, is that correct?

The Witness: That was last year. I believe he has the figures for—

Hearing Examiner Pack: 1954. I believe Mr. Simon's point is that part of that was a payment of the bill for the original stock, the original inventory.

The Witness: No, sir; I believe he excluded that.

Mr. Simon: Excluding the original inventory, am I correct in the assumption that you paid them for reorders and fillins of patterns, \$178, approximately \$178 last year?

The Witness: Well, maybe. Here is the thing I want to get straight. I sent them a check for what I owe them, not what they have sent me.

By Mr. Simon:

Q. The only point I was trying to make, Mr. Dotson, is according to this information, if it is right, they sent you, or they gave you credit rather for approximately twice as many patterns that were discarded as the number of patterns you sold?

A. Well, I don't follow you there.

Q. Did you recall one time one of your girls made a mistake and threw a lot of patterns away?

A. Yes.

Q. And didn't the number of patterns for which they gave you credit during 1954, wasn't it almost double the number of patterns that you paid for?

A. Well, the instance you referred to happened in 1955. [fol. 154] Q. I see, but in 1954, didn't you get credit for approximately twice as many patterns as you paid for?

A. That I don't know. I don't have any figures; I don't recall the relationship.

Q. Does it sound strange to you?

A. I am just not acquainted with it.

Q. If they did give you credit for two patterns for every one you paid for, it would certainly be an unprofitable account, wouldn't it?

Mr. Smith: I object. There is nothing in the record showing that it did.

Hearing Examiner Pack: Was the question completed, Mr. Reporter. Read it back.

(The reporter read the question as follows:

"Question: If they did give you credit for two patterns for every one you paid for, it would certainly be an unprofitable account, wouldn't it?")

Hearing Examiner Pack: Mr. Simon, I don't understand the record shows that up to the present time. Do you intend to show it later and make the necessary connection?

Mr. Simon: Mr. Smith has subpoenaed the very figures that I am reading from, and I assume that pursuant to his—

Mr. Smith: Mr. Simon has been kind enough to hold them from me too.

Mr. Simon: You haven't put the witness on the stand yet.

Mr. Smith: You are withholding them; you can't deny that.

Mr. Simon: I am not withholding anything. May I have your file and read it?

Mr. Smith: No, it is not my file.

Mr. Simon: All right. May I ask another question, Judge? It would save a lot of time.

Hearing Examiner Pack: All right.

[fol. 155] By Mr. Simon:

Q. Before you opened this store you were a Newberry Manager for how many years, or for many years?

A. Yes.

Q. In your Newberry experience you found that to be a little different type of operation, more emphasis on soft goods, and less on hard goods?

A. It is getting that way.

Q. As a Newberry Manager, you knew the terms that Simplicity gave Newberry, didn't you?

A. Yes.

Q. And when you opened up your store did you go to Simplicity or did they come to you?

A. I wrote them.

Q. Oh, you sought them out?

A. Yes.

Q. When you sought them out, you know that what they were giving you, or you knew they weren't giving you the same terms they were giving Newberry, didn't you?

A. After they came in.

Mr. Smith: That is immaterial; whether he sought them out or whether he knew the terms has nothing to do with this contract.

Mr. Simon: I guess nothing has anything to do with it then?

Mr. Smith: Well, that don't.

Hearing Examiner Pack: I don't understand that you have objected to it, Mr. Smith.

Mr. Smith: I do object to it as to whether he went to Simplicity and entered into a contract or whether Simplicity went to Dotson and asked that Mr. Dotson enter into a contract is utterly immaterial. They both signed the contract. There is no dispute about it.

Hearing Examiner Pack: I understand that question was preliminary to the next question as to what information Mr. Dotson had at the time with respect to the Newberry operation.

Mr. Smith: That is equally irrelevant and immaterial. If he knew they were given better terms to Newberry.

Hearing Examiner Pack: I'm not so sure about that. That might bear on the competitive angle. Objection is [fol. 156] overruled. I believe the question is whether at the time you—

Mr. Simon: Signed the contract—

Hearing Examiner Pack: You knew about the general arrangement of Simplicity with Newberry stores, Mr. Dotson?

The Witness: Yes, I did, sir.

By Mr. Simon:

Q. At no time did you ever suggest to Simplicity that you should get the same terms as Newberry?

A. That is right.

Q. You did not?

A. No.

Q. And do I understand a few weeks from now you are opening a second store in Virginia?

A. Yes, it will be next Fall.

Q. But you have already told Simplicity that you want their patterns in your second store, right?

A. That is right.

Q. And you know that they will still be on the terms you have for your Bethesda Store?

A. That is correct.

Q. Now, does a chain store such as Newberry have overhead and operating expenses in addition and over and above the overhead and operating expenses you have?

A. Yes, they do.

Q. They have District Supervisors, Area Supervisors, Main Offices, and each store has to pay a share of that overhead?

A. Probably so.

Q. And is there any other way that they can offset that increased overhead other than to get advantages of their mass buying power?

A. Well, that's right. I mean they do get advantages of mass buying power.

Q. When things are exactly even, the advantages of the mass buying power would offset the increased overhead from their type of operation?

A. It would be an advantage, yes.

Q. And you had that in mind when you opened this [fol. 157] store and happily took the Simplicity contract on less favorable terms than Newberry?

A. That's true.

Q. Now, do you handle patterns to make a profit on them, or as a service to your customers in the sale of yard goods and accessories and the other things in your store?

A. Well, I will tell you it is a combination of both.

Q. I notice that after you took on the Simplicity line, in spite of the fact that you hadn't done any great volume in it, you took on a second line of patterns, is that right?

A. Well, they came in about the same time. As a matter of fact, I believe Butterick arrived before Simplicity actually arrived.

Q. Did you think handling the two lines of patterns would be more profitable, dollar wise, for you, or was it because it would be a greater service to your customers?

A. It increased the assortment, so it increased the appeal.

Q. Is that to make more profit in the patterns, or to

render a greater service to your customers to get them to buy other things?

A. There again, I would say it is a combination of both.

Q. It isn't very profitable for the pattern company who has to give you full credit for all the discards that are thrown away to have your volume diverted between the two companies, is it?

A. I don't know; that's the pattern company's problem.

Q. And you don't care what their losses are?

A. As long as they are happy with it, frankly, so am I.

Q. And Butterick gives you 90 per cent credit for all the patterns you throw away, and Simplicity gives you 100 per cent?

A. That is correct.

Q. And you don't care how many patterns you have to throw away as soon as they give you them?

A. I am sure neither one would get another contract unless they were agreeable to it.

Q. But the fact that you have the two lines means the companies have to throw twice as many patterns away, because every four months they discard roughly one-sixth [fol. 158] of the line, isn't that true?

A. Well, that is probably it. You have the figures. I don't know how much of the line they discard.

Q. Every year and a half there is a complete change in the pattern?

A. Yes.

Q. So, every year and a half you throw away a complete stock of patterns, and Simplicity Pattern Company gives you full credit and Butterick gives you 90 per cent?

A. Yes.

Q. The Simplicity terms to that extent are a little better than Butterick?

A. Yes.

Q. You also compete with the Singer Sewing Machine store on Wisconsin avenue?

A. Yes.

Q. What kind of patterns do they sell?

A. I don't know what they have. Maybe they have Simplicity; I do not know.

Q. They have McCall, don't they?

A. Some stores carry McCall. I don't know whether the one in Bethesda carries it or not.

Q. You don't know what kind they have?

A. No.

Q. Now, the Woolworth store on Wisconsin avenue does not carry fabrics, does it?

A. As far as I know they do not; I don't know.

Q. I take it that this shopping center you are in is some five or six blocks from Wisconsin avenue?

A. Well, actually it is two or three blocks from the avenue itself.

Q. From the Woolworth store?

A. It may be another block; it is a ten minute walk.

Q. Isn't it a separate shopping community, or shopping center, as they are known in these days?

A. Well, we have the same trade area.

Q. Doesn't your trade come largely, Mr. Dotson, from those apartment buildings in that area?

A. A good portion of it does.

Q. That is the biggest portion, isn't it?

A. I wouldn't say it is the biggest, but I would say it is a good portion, because when the people who drive to the [fol. 159] shopping center don't come from the apartment. The people who walk to it usually come from the apartment buildings, but we have quite a few automobiles in the center; space for 200 cars.

Q. Would it be fair and accurate to say that while you compete with Woolworth's stores it is sort of a fringe competition?

A. Well, you would have to define fringe. I mean we have—the only criterion we have of where a customer comes from—because we don't have charge accounts—is on checks, layaways, and refunds. We do require addresses on those. And we have people from Chevy Chase and from Rockville, and even from as far away as Silver Spring. Now, what portion of those people make up our total, I don't know.

Q. When you selected this site, one of the things you had in mind as I understand it, was to get away from stores like Woolworth, is that right?

A. Yes.

Q. And having been there now for two years, are you reasonably satisfied that you were reasonably successful?

A. Yes, we are not away from them, but we have the advantage of parking which I feel they do not have.

Q. So, as far as you know, do Woolworth's have any advantages over you in the sale of patterns?

A. As far as what?

Q. Selling patterns is concerned?

A. Their price is the same.

Q. Same as yours?

A. Yes. They do get better terms.

Q. I mean as far as selling?

A. No.

Q. You would feel happier if you got lower prices for the patterns—

Mr. Smith: I object to that as to whether he feels happy or sad has nothing to do with this case.

Mr. Simon: I thought it did from the questions you were asking.

Mr. Smith: Well, I don't.

Hearing Examiner Pack: I take it the question in effect, is whether Mr. Dotson would like to get a lower price or certain other advantages possibly?

[fol. 160] Mr. Simon: I would be glad to rephrase it. I take it everything in your store, including the patterns, you would like to get at a lower price if you could?

The Witness: That's correct.

By Mr. Simon:

Q. If you could get a lower price than Woolworth's you would even like that better?

A. Yes.

Q. But apart from the fact that you would like to get a lower price, if you could, are you in any way injured or hurt by the fact that Woolworth's terms are different than yours?

Mr. Smith: I raise the same objection because the word "injury" or "hurt" is too vague and indefinite to have any answer which I can understand.

That is a legal term put into that statute which is not for witnesses to answer, in my opinion. It is for the Judge to determine.

Hearing Examiner Pack: Objection is overruled. However, Mr. Smith, you can, of course, go into the matter on redirect, if you wish, and bring out from Mr. Dotson just what he has in mind by what ever answer he gives to the question.

By Mr. Simon:

Q. Do you have the question in mind, Mr. Dotson?

A. Did you say was I hurt or injured because of the fact that Woolworth's got patterns at a different term than I do?

Q. Yes.

A. By the sale of patterns, no. I mean they sell them for the same price, but I am in business for a profit.

Q. And you would like to make all the profit you can?

A. Yes.

Q. Do you know of any instance where you have lost a sale of a pattern to Woolworth's because of the terms they got?

A. No.

Mr. Smith: It has been testified they are sold at the same price.

[fol. 161] Mr. Simon: I don't believe he has testified to that, but I will ask him that.

Mr. Smith: Well, you have yourself.

By Mr. Simon:

Q. Do Woolworth stores sell the patterns at the same price you do?

A. Yes.

Q. Do you know whether they are fair traded?

A. I don't know whether they are, but they are pre-printed.

Q. They sell them for exactly the same price you — Never been any problem there?

A. No.

Q. And you do have a 50 per cent standing debit?

A. Yes.

Q. In other words, the company is giving you permanent credit half the value of your inventory?

A. At five per cent.

Mr. Smith: I didn't get that answer.

The Witness: At five per cent interest.

Mr. Smith: At five per cent interest?

The Witness: That's right.

Mr. Simon: I have no further questions, Your Honor.

Redirect examination.

By Mr. Smith:

Q. Mr. Dotson, was part of the conversation with Mr. Pullman and Mr. Simon at your store, trying to persuade you that your store wasn't in competition with Woolworth's?

A. Well, they expressed some doubt that it was, sir.

By Mr. Smith:

Q. Well, if the store carries the same item, what is your opinion?

A. Well, if the store carries the same item, I am in competition with them if we have the same trading areas and serve the same people.

[fol. 162] IRVING FLISS was thereupon called as a witness for the Commission, and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Smith:

Q. Mr. Fliss, where do you live?

A. University Park. You mean home address?

Q. That is right.

A. University Park.

Q. Where is that?

A. Maryland.

Let me tell you, I don't owe Simplicity any money, either.

Q. You are a partner in the Mel-Ron Fabric Shop?

A. That is correct.

Q. Where is the Mel-Ron Fabric Shop?

A. West Hyattsville. That is the Queens Chapel shop.

Q. Is that in Maryland?

A. That is in Maryland.

Q. How long has the Mel-Ron Fabric Shop been in business?

A. Eight years.

Q. You have been partner in the business all that time?

A. That is correct.

Q. Prior to that time, were you in the merchandising business?

A. Yes.

Q. What line of business is the Mel-Ron Fabric Shop engaged in?

A. Well, I would say fabrics, selling piecegoods and notions. But primarily selling piecegoods.

Q. What are notions?

A. Well, zippers, seam bindings, buttons, bias folds, hooks and eyes. Roughly, I would say there are about a thousand of them.

Q. You sell Simplicity patterns?

A. That is correct.

Q. How long have you been selling Simplicity patterns?

A. About eight years.

Q. I hand you here a document which appears to be a photostatic copy of the contract between the Mel-Ron Fabric Shop, signed by Irving Fliss. Is that your name?

A. That is correct.

[fol: 163] Q. With Simplicity Pattern Company dated September 18, 1953?

A. That is the second one, I think.

Q. Second one?

A. That is correct. I had one before which ran for five years and after the end of five years, we renewed.

Q. On the back of that—it is in two parts. That is part of the contract, too, isn't it?

A. Yes.

Q. The second page?

A. Yes.

Q. Do you have the original with you?

A. No, I don't.

Mr. Smith: Are you willing to stipulate that it is his contract, Mr. Simon?

Mr. Simon: Yes, Mr. Smith.

Hearing Examiner Pack: Do you wish it marked for identification?

Mr. Smith: I wish it marked, and offer it in evidence at the same time. Since counsel has stipulated and agreed that that is the contract by and between Simplicity Pattern Company and the Mel-Ron Fabric Shop.

Hearing Examiner Pack: Let the exhibit be marked for identification as Commission's Exhibit 30-A and B and then let the record show that by agreement the Exhibit is received in evidence under that same number; that is, Commission's Exhibit 30 A and B.

(The contract referred to was marked Commission's Exhibit 30 A and 30 B for identification and received in evidence.)

By Mr. Smith:

Q. Mr. Fliss, your contract as identified is now in evidence as Commission's Exhibit 30A and 30B. That is the contract that the Mel-Ron Shop has been operating under since September 18, 1953. Is that right?

A. That is correct.

Q. We will briefly go over this contract: Still referring to the same Exhibit numbers.

The cost price appears there.

Under the caption, "Terms" it says, "We will pay [fol. 164] transportation charges on all goods received from you or returned by us to you."

That means Mel-Ron pays transportation on all patterns shipped?

A. That is right.

Q. That includes the initial stock, too, doesn't it?

A. That is right. It also includes the returns.

Q. Also includes the returns.

Now, you don't have any standing debit under this contract. You don't so indicate. Is that right?

A. That is correct.

Q. Now, you paid for your patterns, you paid for your initial stock—when I say "you," I mean the Mel-Ron Fabric Shop.

A. That is correct.

Q. You paid for all patterns received in addition to the initial stock.

A. That is correct.

Q. Now, over here on the other side, which is Commission's Exhibit 30B, it appears there that you get a certain number of previews each month.

A. That is right.

Q. Are they imprinted or not? Do you know?

A. They have our name on it.

Q. Your name.

A. That is correct.

Q. They cost you how much?

A. I think it is \$7.50 a thousand.

Q. Well, are these numbers here, these figures after the January issue, 750. Is that the number you get of previews, or the cost of them?

A. That is the amount, I think. In January, they vary, I believe. At different times of the year you get more; sometimes less. This past month we received 500 of them. I think they are \$13.00 a thousand. I think that is right. We pay \$6.50 for the 500. They are \$13.00 a thousand.

Q. I see.

Down a little lower, it says, "Simplicity Counter Catalogue" and it specifies two each month.

A. We receive two every month.

Q. Do you pay for those?

A. We pay for those.

Q. What do you pay for them?

A. How much?

[fol. 165] Q. Yes.

A. Two and a half dollars each, I believe. I'll check. That is correct.

Q. Down under "Pattern Cabinets and Equipment" there is an item down there "On hand, nine, sectional cabinets."

What does that mean?

A. That is the cabinets that we keep our patterns in.

Q. How many of them do you have?

A. Well, I had several of them. Then we bought some other ones and returned some of them. Now, I have in the store, I guess, two cabinets that are the three-drawer type,

and then—no, I have three cabinets of the three-drawer type.

Q. Did you buy them from Simplicity?

A. That is correct.

Q. Do you know how much you paid for them? All of them?

A. It is right hard to tell you now. I know the last one we bought—I think it was \$100.00 and we pay them \$20 every six months for them.

Q. There is a notation down here—can you read that? "Above on rental"?

A. "Above on rental" is five per cent per annum. On termination of service, same to be returned prepaid to Niles, Michigan."

Q. That means you pay rental on them, and when you are through with them, you have to send them back prepaid to Simplicity at Niles, Michigan. Is that right?

A. No, I don't think the last ones we got were under that clause.

Q. What does this notation down there have reference to?

A. I think it was the ones we originally got.

Q. The ones you originally got?

A. I think so.

Q. You mean the last ones you got you paid for outright?

A. We paid for them outright over a period of time. They will eventually become ours.

Q. They were not on rental. You paid for the last ones?

A. That is right.

Q. Do you know how much you paid for the last ones?

A. We got two three-drawer cabinets and I think they were \$100 apiece.

[fol. 166] Q. The others you have paid on that rental basis. Is that what that applies to?

A. That applies to that, but I don't remember paying on them. I really don't. I would rather not answer that question. I am not sure.

Q. But as far as you know, you have paid outright for those that you have?

A. That is correct.

Q. And haven't rented them?

A. Not the last ones.

Q. You said you had about three of them at \$100 apiece?

A. Two of those.

Q. You have how many altogether?

A. Of Simplicity's? I think I have three cabinets carrying three drawers apiece, with four sections in each drawer.

Q. Whatever you have, they are either on lease or paid for by Mel-Ron Shop. Is that right?

A. That is right.

Q. Those that are on lease have to be returned to Simplicity, don't they, under that agreement?

A. I guess so.

Q. Mr. Fliss, is the Mel-Ron Fabric Shop an independent store, or is it a member of a chain outfit?

A. Independent.

Q. Down the street from you in Mt. Rainier, No. 3179 Queens Chapel Road, is a Kresge Store, isn't there?

A. That is right.

Q. Have you ever been in that store?

A. No, sir, I haven't.

Q. Well, you don't know what that store sells?

A. Well, not to name any specific items, no, sir.

Q. You know whether they sell Simplicity Patterns or not?

A. That, I do know.

Q. Do you know whether they sell notions or not?

A. I imagine they sell notions, yes, sir.

Q. Do you know whether they sell any yard goods?

A. No, I don't know whether they do or not.

Q. Do you consider the Kresge Store at 3179 Queens Chapel Road to be in competition with the Mel-Ron Shop in the sale of patterns and notions?

A. Well, if it is just specifically to patterns and notions I would say yes.

{fol. 167} Q. If they sell yard goods, would you say they were in competition with you in the sale of yard goods?

A. Yes, sir.

Mr. Simon: I object to that and move that it be stricken. There is no evidence they do sell yard goods.

Mr. Smith: We will get some.

Mr. Simon: There is none now, and yesterday, I was restricted to the evidence of current record. There is no evidence now.

Mr. Smith: Will you leave that in, Your Honor? I have a witness here under subpoena from that store.

Hearing Examiner Pack: In view of Mr. Smith's statement that the matter will be sufficiently connected up, the motion to strike will be denied.

By Mr. Smith:

Q. How far is this Kresge Store at 3179 Queens Chapel Road from your store?

A. I would say about three-quarters of a mile, roughly.

Q. Well, the section you are in out there is in a shopping center, isn't it?

A. It is more or less of a shopping center. It isn't a shopping center that a car can drive up into it. You have to park on the street, but all the stores are located more or less in the same place. Which makes it a shopping center.

Q. There is a parking space?

A. Parking space behind the stores.

Q. Pretty adequate parking space behind you?

A. Plenty.

Q. Is it true or not that many people who trade in nearby Mt. Rainier also trade around your area on Queens Chapel Road?

A. Yes, sir.

Q. Most housewives out there travel in automobiles, don't they?

A. That is right.

Q. So that a matter of three-quarters of a mile distance wouldn't make too much—

[fol. 168] Mr. Simon: I object to Mr. Smith's testifying. This is direct examination.

Hearing Examiner Pack: I think that is leading, Mr. Smith.

By Mr. Smith:

Q. Well, would a question of a matter of three-quarters of a mile distance be any interference, or have any bearing on whether a housewife bought from you or down at Kresge's?

A. I would say it does, yes.

Q. Well, in what respect?

A. Well, in a suburban shopping area, three-quarters of a mile, if you are in competition with a store, it doesn't mean anything as far as competition is concerned. The lady can get into her car and three-quarters of a mile one way or the other doesn't mean much.

Q. That is what I was getting at.

Mr. Fliss, you recall when I was out to your store, the Mel-Ron Shop, to talk to you?

A. Yes, I do.

Q. Do you remember about when that was?

A. Let me see—

Q. About a week or ten days ago, wasn't it?

A. About ten days ago.

Q. I left you a subpoena at that time, didn't I?

A. That is correct.

Q. Served you with a subpoena.

A. That is right.

Q. To appear here as a witness on behalf of the Federal Trade Commission, didn't I?

A. That is right.

Q. Mr. Fliss, do you know Mr. Simon, who sits here at the table and is counsel for the respondent?

A. I do.

Q. Where did you first meet him?

A. At my store.

Q. When was he there?

A. Last Friday.

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Q. Was anybody with him?

A. Mr. Pullman.

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A. Well, it was more or less along the same trend, that [fol. 169] he would ask me whether I thought Kresge's was competition to me. I told him the way I felt about it, and the way I felt about their being competition, as long as they don't have piece goods, I don't think they would affect me.

Naturally, I would like to have sole distribution of patterns out there; everybody else would. But as far as they,

themselves, were concerned, just patterns, we didn't make any money on them anyhow.

Q. What did they say to you in regard to possible competition between your store and Kresge's?

A. Well, they told me that Kresge's wasn't competition to me as far as patterns were concerned.

A. Was not. As far as patterns were concerned, which, in a way is true, as long as they don't have piece goods. Once they have piece goods in there, that makes them competition, because that is the backbone of our business, piece goods.

Q. Well, if you sell notions and patterns together—you do sell notions and patterns, don't you?

A. That is correct.

Q. And if Kresge's sells notions and patterns—I am speaking of this one on Queens Chapel Road now.

A. That is right.

Q. In your opinion, would your store, or that store and the Mel-Ron Shop be in competition? Would it or would it not?

A. Yes, it would be. If you break down the two items like that, with Kresge selling patterns and notions, and the Mel-Ron Shop selling patterns and notions, I would say they would be in competition.

Q. And if it appears further that they sell yard goods, your store would be in competition with them on that, too?

A. Yes.

[fol. 170]

Cross examination.

By Mr. Simon:

Q. Mr. Fliss, I don't want to ask you any questions if the answers are things you don't want to disclose. But is it a fair statement that you have a fabric inventory in your place of maybe forty or fifty thousand dollars?

A. No, I don't think I have that much.

Q. You don't?

A. No, I would say about thirty.

Q. Thirty thousand dollars?

A. That is correct.

Q. And is the volume of fabric business during the last year or two years above, could we say, conservatively, above a hundred thousand dollars a year?

A. No, sir.

Q. I don't want to press you.

A. It is a little under a hundred.

Q. That is good enough for my purpose.

Now, do you sell patterns for the purpose of making a profit on them, or as a service to your customers in the sale of fabrics?

A. More or less as a service, in order to sell fabrics.

Q. In order to sell fabrics.

A. That is right.

Q. If you didn't have fabrics, by that I mean materials for making dresses, if you didn't have them, would you handle patterns?

A. No, sir.

Q. You do handle drapery materials, for instance, is that right?

A. We have very little of that.

Q. But if you didn't have dress goods in your store, you would never have patterns.

A. That is right.

Q. If you could sell the same quantity of dress goods without having the patterns in your store, would you prefer not to have the patterns?

A. That is right.

Q. Then shall we say they are a necessary evil?

A. That is right.

Q. You have three lines of patterns?

A. I do.

Q. They are Simplicity, McCall, and Butterick?

A. That is right.

Q. Are the terms Simplicity charges you for patterns at [fol. 171] least as favorable, or more favorable, than Butterick and McCall?

A. I would say they are just about the same. They might be a little better.

Q. On the returns?

A. That is right.

Q. Simplicity gives you 100 per cent; the others 90 per cent?

A. That is right.

Q. The same thing Simplicity charges you for, they also charge you for?

A. That is right.

Q. You talked about some cabinets.

A. That is right.

Q. Would you describe them for the Court?

A. They are two cabinets, three-drawers. Each drawer holds, I think, four rows of patterns.

Q. They are all-steel cabinets?

A. They are metal. They might be steel. I never examined whether they are steel or not. But they are metal cabinets.

Q. And they are——

A. Well constructed.

Q. We lawyers are accustomed to file cabinets.

A. That is right. They are like file cabinets.

Q. But about twice the width?

A. Yes.

Q. And they have drawers on roller bearings?

A. Yes.

Q. And they are painted to resemble wood?

A. Yes.

Q. They have a grain running through, looking like wood.

A. That is the newer type.

Q. That is Type 325CY.

A. That may be right. I don't know the number.

Q. I show you a document, to see if that refreshes your recollection, your order for two Number 325CY cabinets.

A. That is right.

Q. And you asked for the cabinets, rather than our trying to sell them to you?

A. That is right. I would like to have them for nothing, but I had to pay for them.

Q. And you would be still happier if they paid you to take them?

A. Yes.

Q. In your store, you have the patterns right up front?

A. That is correct.

Q. And there is a counter with the pattern books and and chairs for the women to sit down?

A. Correct.

[fol. 172] Q. Is it customary in your type of store to have fabric benches and chairs for the women to sit down?

A. That would be a matter of opinion for the store. The last store we had, we didn't have benches, but we do in this one.

Q. Your principal competitors are Hecht Company and Woodward and Lothrop, and the other department stores?

A. Yes.

Q. Do you know whether they have chairs for the women to sit and look at the patterns?

A. No, I do not.

Q. But you do?

A. I do.

Q. Do you lose money on patterns?

A. I don't think I lose any money. But I don't think I make any on them.

Q. The same would be true of all three lines?

A. That is about right.

Q. Now, the pattern department, as a pure matter of profit, would be more profitable if you had only one line of patterns.

A. Repeat that?

Q. As a pure matter of profit on patterns, forgetting fabrics, your line of patterns would be more profitable if you had only one line. You would have less investment, less overhead?

A. I can't say that is true. If you have one item, you are selling one. If you have three, you have a chance to sell three.

Q. Do you think you have as much chance to sell three times as much as if you had only one line?

A. I don't think I sell three times as much.

Q. Isn't it a fact that what you are really interested in is selling a pattern to the woman, no matter how large a line of patterns you have to have so she will buy the fabric?

A. That is right.

Q. But you have three lines, not because three lines is more profitable, but because it sells fabrics?

A. That is correct.

Q. Now, I believe you said you would be happy to have a Kresge store on one side of you if they didn't sell fabrics?

A. That is right.

[fol. 173] Q. Would you be doubly happy to have a Woolworth's on the other side, if they didn't sell fabrics?

A. That is right.

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Q. I am not sure the record is complete, Mr. Fliss, as to what is a fabric.

In your business, "fabrics" means fabrics for making dresses.

A. It doesn't confine it to just dresses. It is suits, coats, costumes, everything. It is even decorator things, like table cloths. Everything that goes into it.

Q. Right.

Now, your fabrics go up to six or seven dollars a yard.

A. We have some for \$9.98 a yard.

Q. You don't cater to the 29 cents a yard trade, do you?

A. I don't cater to it, but every once in a while we have to put out sales in order to meet competition and things like that.

Q. What percentage of your business would you say was in yard goods of 50 cents a yard or less?

A. Well, we don't have anything as far as—well, I would say maybe about five per cent. Fifty cents or less.

Q. Is that for dresses?

A. Not for dresses.

Q. What would that be?

A. That would be huck toweling, and things like that.

Q. There is no pattern to toweling, is there?

A. No pattern? No. There is one for outing flannels and things like that, that you sell for fifty cents or less.

Q. What percentage of your business were the fabrics used in connection with patterns, that you would make with a pattern, sells for less than 50 cents a yard?

A. I would say maybe five per cent.

Q. I thought five per cent included the toweling?

A. Well, let me see. You have me confused now.

It might be, say, about three per cent of it for fifty cents or less. That doesn't mean during the whole year.

Now, there are certain times of the year when you can

buy dress material for less than fifty cents a yard. Right [fol. 174] now, we are selling broadcloth at three yards for 89 cents.

Q. That material you are talking about, whether fifty cents or less or more, comes in bolts?

A. That is right.

Q. About how much does a woman need for a dress?

A. They don't use that for dresses, although they use it in a type of stuff, like to make up for nightgowns, pajamas, baby saques, baby kimenos and things like that.

Q. If she wants two or six or eight yards, you cut it off the bolt?

A. That is right.

Q. You are familiar with remnants?

A. Yes.

Q. Do you consider remnant selling for 29 cents or 39 cents a yard as dress fabrics?

A. No.

Q. If a store had nothing but a \$300 inventory of remnants, selling for 29 or 39 or 49 cents a yard, you wouldn't consider that fabric competition, would you?

A. No.

Q. Now, your total for pattern sales are about how much a year, Mr. Fliss, roughly?

A. With Simplicity?

Q. The three lines.

A. Oh, the three lines. I don't know if I can answer that.

Q. Would you say about five thousand dollars a year for the three?

A. I would say that.

Q. About how much of that is Simplicity?

A. About half.

Q. You sell as many Simplicity patterns as the other two put together?

A. I think so.

Q. Do you have the same pattern books on the counter for the women to look at for all three?

A. That's right.

Q. So the fact that Simplicity sells as many as the other two put together is purely a matter of the housewife picking Simplicity?

A. That is right.

Q. There was no effort on your part. No preferred space on the pattern counter?

A. That's right.

Q. Just a matter of two to one preferring to buy Simplicity?

A. Yes.

Q. This \$5000 of retail lines for Simplicity, is that retail or wholesale?

A. I would say that would be wholesale.

[fol. 175] Q. Wholesale is 40 off the retail price. So if you sold \$5000 at wholesale, it would be about \$7000 at retail. Is that roughly it?

A. Roughly, yes.

Q. Mr. Fliss, is a substantial part of your business connected with home sewing by schoolgirls?

A. A good part of our business is.

Q. Do you have promotional tie-ins with the Home Economics classes in the schools?

A. When you say "promotional tie-ins" can you elaborate?

Q. When I was in your store on Friday, I saw you had some aprons made in high schools that you were *display*.

A. We were displaying National Education Week and we were working with the schools.

Q. That is a substantial part of your promotion, working with the schools?

A. Right.

Q. Has Simplicity been of great help to the fabric dealers in promoting home sewing in the schools?

A. I don't know if I am qualified to answer that. I think they work with the schools, too.

Q. You know that they work with the Home Economics teachers in the schools in your territory, don't you?

A. I think so. I am not sure I can testify to that.

Mr. Smith: He is answering the question. He says he is not sure.

The Witness: The teachers don't come in and say they have been working with Simplicity Company, so I don't know that they do. I know the Companies work with schools, but I don't know that they are working with our teachers.

By Mr. Simon:

Q. Whatever work may do with schools is a real help to fabric dealers like yourself?

A. That is right.

Mr. Smith: Your Honor, I object to that. The witness has said he doesn't know whether they do any work with schools or not.

[fol. 176] Mr. Simon: Judge, yesterday, a witness testified.

Mr. Smith: It doesn't make any difference about yesterday. I would like to state my objection.

Hearing Examiner Pack: Let Mr. Smith conclude.

Mr. Smith: It doesn't matter what happened yesterday. The question before the Court today is this answer, or expected answer, to this particular question. The witness has stated he doesn't know whether the Simplicity Company people work with schools out in his neighborhood or not. I think that ought to be a terminus to that inquiry.

Hearing Examiner Pack: I understood Mr. Fliss' statement to be that he knows very little about the matter from a general standpoint, but he had had teachers and others tell him, or he had learned in various ways, that there was at least some work on the part of Simplicity with schools and the teachers in his own community.

Am I right about that, Mr. Fliss?

The Witness: That is right. I can't say that the teachers come right in and say they work with Simplicity themselves. But I do know that they get brochures from them, and I think every once in a while they sell them advertisements about home sewing; that is, Home Economics students, that is helpful to the students. But as far as saying I know it to be a fact, I can't say that.

Hearing Examiner Pack: I think Mr. Fliss' knowledge of the situation is quite limited, but I think the testimony should remain.

Anything further, Mr. Simon?

By Mr. Simon:

Q. I don't think you answered the question. As to the extent that they do do promotional work in the stores, does that help you and the dealers like you?

A. Yes.

Q. And if their promotional work results in a girl making a dress, they sell a 35-cent pattern and you sell \$3, \$4, \$5, or \$10-worth of fabric.

A. Don't go as high as ten dollars, now. There are different types of schools, and things, but we do sell piece goods with the patterns, which helps us in our business.

Q. And the piece goods is the main item in making a dress, isn't it?

A. That is right.

Q. Now, if a woman—I take it that in your business, one of your jobs is to try to anticipate the needs and buying habits of your customers.

A. That is right.

Q. If a woman set out from her house to buy a pattern, as between you and Kresge's, is there any doubt that she would come to you to buy the pattern?

Mr. Smith: Before you answer that. That question seems to me to be improper without stating an objection.

Hearing Examiner Pack: I think so, Mr. Simon. It seems to be too much in the nature of a conjecture, a mere guess on Mr. Fliss' part.

Mr. Simon: I withdraw the question.

By Mr. Simon:

Q. Mr. Fliss, the chains sell patterns at the same price you do; at least, the Kresge's you talked about sells at about the same price you do.

A. Yes.

Q. In the sale of patterns, Simplicity Patterns, does the Kresge Company have any competitive advantage over you?

A. Well, they probably buy it cheaper than we do. But they don't sell it for any less than we do.

Q. I appreciate that they may pay less, but in the sale of patterns to the housewife, do they have any competitive advantage over you?

A. No, I wouldn't say that.

By Mr. Simon:

Q. Mr. Fliss, Mr. Smith talked about a woman going into a Kresge Store to buy a light bulb and she saw a pattern, so she bought a pattern.

A. That happens.

Q. That is what we call an impulse sale.

A. That is right.

[fol. 178] Q. When a woman goes into a Kresge Store to buy a light bulb, or any of the thousand things they have there, and she buys a pattern on an impulse sale, a customer has been created to buy something from the fabric stores.

Mr. Smith: Just a minute before you answer that. I didn't argue, as counsel has stated, that a woman goes into a Ten Cent Store to buy a light bulb and while she is there, she buys a pattern. He has put those words in my mouth. I said it would be wholly in the realm of speculation for me to contend that, because I don't know what that woman goes in there to buy. And counsel on the other side doesn't know that either. I have no evidence, nor does he, one way or the other, on the proposition, but I merely said that it would be just as fair for me to argue that as it is for counsel for the respondent to argue through questions to this witness that because he sells McCall and other patterns, that a woman will be more apt to come into his store to get a Simplicity pattern than to go into a Ten Cent Store.

I think either argument would be something that would be purely speculative and not evidence. That is what I intended to say, and I would like not to be misquoted on it again.

Hearing Examiner Pack: It seems to me, gentlemen, that the answer to the present question would be rather obvious. I think the question is simply whether or not a woman went into a Ten Cent Store, or any other store, for that matter, and bought a pattern, and if that store didn't happen to handle yard goods, whether that woman would by reason of buying a pattern, become a potential customer for yard goods in some other store.

It seems to me the answer to that would be obvious.

Am I right about the question, Mr. Simon? Is that your question?

Mr. Simon: Yes, sir. Whether the impulse buying in a Kresge Store three-quarters of a mile away from him doesn't create a potential customer for a yard goods store, [fol. 179] and the next question would be whether he would be one of the sellers of that yard goods.

Hearing Examiner Pack: I don't understand that Mr. Smith has objected to that particular question.

You may answer, Mr. Fliss.

The Witness: I would say she would be a potential customer for a yard goods sale.

By Mr. Simon:

Q. So to that extent, you would be benefitted by the fact that she made the impulse sale in a Kresge Store three-quarters of a mile away.

A. She may come into our store and she may not. I wouldn't say that.

Q. But you may get the yard goods sale. And that is benefit.

A. Yes.

Q. Has Simplicity Pattern Company ever treated you unfairly?

Mr. Smith: I think you ruled that out once.

Hearing Examiner Pack: Yes, I think that is too broad in general, Mr. Simon. The ruling is similar on that as on a similar question yesterday.

By Mr. Simon:

Q. I appreciate that you would like to buy patterns and everything else as cheaply as you can, or cheaper than Kresge.

A. I would like to get them as cheap as Kresge's Store.

Q. But, apart from what you would like, is your business in any way hurt by the fact that Kresge has any different terms than you have?

Mr. Smith: Your Honor, I object to that again. Respondent alleges in his question that these patterns are fair traded. I presume that is true. They are all sold at the same price. Everything. I presume that is true.

Now, the witness has already testified that his profits have been hurt. Now, this question here is entirely too

broad to elucidate an answer that is intelligible to me, as to whether he has been hurt.

[fol. 180] Hearing Examiner Pack: Will you read the question please?

(The report read the question back as follows:)

"But apart from what you would like, is your business in any way hurt by the fact that Kresge has any different terms than you have?"

Hearing Examiner Pack: Do you mean by that different terms by Simplicity Pattern Company?

Mr. Simon: May I ask the question again?

Hearing Examiner Pack: Yes.

By Mr. Simon:

Q. Is your business in any way hurt by the fact that Simplicity Pattern Company is different in their terms to Kresge than they are to you?

Hearing Examiner Pack: You have the same objection?

Mr. Smith: I have the same objection.

Hearing Examiner Pack: The objection is overruled. It seems to me that Mr. Fliss, as a business man, would have an opinion on the question.

Mr. Smith: I object specifically to the use of the word "hurt". It is vague in meaning.

Hearing Examiner Pack: My understanding of the term is that it is the same as "injured". Is his business injured by reason of the facts stated by Mr. Simon.

Objection is overruled.

You may answer, Mr. Fliss.

The Witness: I think my business could be better if I got the same terms as they did.

By Mr. Simon:

Q. You mean you would make more profit?

A. Yes.

Q. But apart from the more profit, is your business in any way hurt or injured by their terms?

A. I don't think by their terms, no.

Mr. Simon: That is all.

Thank you, sir.

[fol. 181] Redirect examination.

By Mr. Smith:

Q. You said something about remnants. What is a remnant?

A. A remnant can be one or two things. It can be a piece of material left over from a bolt; half a yard, three quarters of a yard, or four yards even. Some stores will buy what they call remnants, which can be a four-yard piece of materials, either from Dan River or one of the big mills; but still be dress length and still be in competition with me. Remnants doesn't mean a half yard or one-yard piece. It can be four yards or six yard piece. It is what they term a left-over from the bolt.

Q. If it as as much as ~~four~~ yards, it would be in competition with you?

A. Yes. That is a dress length.

Q. But less, it would not?

A. It would depend on the width. A two-yard piece of material can be a dress length if it is 56 inches wide. It can be three yards.

Q. Well, merely because another store sells remnants doesn't mean it is not in competition with you.

A. It depends on the type of remnants they sell.

Q. What is the minimum limitation of remnants you say would not be in competition with your business?

A. That is covering a pretty broad field. Some stores will sell—actually, no store, I don't think, would sell half-yard remnants, if they were not in the piece goods business. A store not in the piece goods business that is selling remnants is usually selling dress lengths.

Q. If it is dress length or blouse length, it could be in competition with you?

A. I would say so, yes.

By Mr. Simon:

Q. Does your prior answer stand that a \$300 stock of remnants selling for fifty cents or less would be no competition to you?

A. It wouldn't be competition as far as the store actually is concerned. It would take away a sale or two. No question about it, but it takes away a little, but no real competition.

Q. No substantial competition?

A. No.

Mr. Smith: What about a notions department. If it sells patterns and notions, it would be in competition with your patterns and notions department?

A. Yes, it would hurt some in notions.

ARTHUR PHILLIPS, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. Where do you live, Mr. Phillips?

A. West Hyattsville, Maryland.

Q. How long have you been Manager of the S. S. Kresge Store at 3179 Queens Chapel Road? Is that in Mount Ranier?

A. Yes.

Since July, 1939.

Q. Does that store sell Simplicity Patterns?

A. That is correct.

Q. How long have they been selling them?

A. Ever since I have been in the business, 23 years.

Q. You mean Kresge?

A. Yes.

Q. I was thinking of this particular store.

A. They opened up the patterns in October of 1949, when we opened the store.

Q. Does the store have pattern cabinets?

A. We have pattern drawers under the counter. They are not visible to the customer.

Q. Then they are under the counter?

A. Under the counter.

[fol. 183] Q. What are they made of?

A. Well,——

Q. Wood? Steel?

A. They are metal.

Q. How many patterns do they house per cabinet?

A. Per cabinet, I guess there are probably about 250, to a drawer. It all depends on the stock. - But roughly, about 300.

Q. How many cabinets do you have in the store?

A. Each one has three rows, and they are about the width of three patterns. I have two, four, six, eight of those drawers, which are not a cabinet.

Q. How many patterns, all told, would you consider your inventory usually runs?

A. In selling value, or number of patterns?

Q. In number of patterns, or cost value, however you do it for counting purposes.

A. Well, we would probably have an investment of about \$800.00.

Q. In pattern-stock?

A. Yes.

Q. They are all Simplicity?

A. They all belong to Simplicity patterns.

Q. You don't sell any other brands?

A. No other brands.

Q. Do you sell notions in that store at 3179 Queens Chapel Road?

A. What we classify as notions cover a lot of other items along with sewing supplies.

Q. And sewing supplies?

A. That is correct. Sewing supplies are in our notions department.

Q. Would you give us a brief description of the notions and sewing supplies which that store carries?

A. Do you want it as sewing supplies or notions?

Q. However you carry it.

A. Our notions department includes hair goods and shoe-laces, and things like that.

Q. I am speaking of notions in connection with the sale of a pattern.

A. Then we carry threads, needles, sewing machine needles, zippers, repair kits. We also have a Dritz line of pattern tracers, and so forth, that have to do with dress-making.

Q. Do you carry any yard goods in that store?

A. We sell remnants. We are a remnant store, not a yard goods store.

[fol. 184] Q. Of the remnants that you sell, what can they—used for? What are they sold for? For making dresses or blouses, or what?

A. I don't know, of course, what they buy it for. What purpose they make of the merchandise after they buy it. But it can be used for skirts, blouses, shirts, pajamas, any other wearing apparel. Underwear—whatever purpose they want it for.

Q. Well, are your remnants—you heard Mr. Fliss' testimony. You were sitting in the courtroom, were you not?

A. Yes.

Q. He spoke of a remnant of two yards and 54 inches. Do you sell that large a piece?

A. We don't carry 54-inch material. Between 24 and 36 is the largest we carry. Some of it will come in anywhere from a yard and a quarter to ten yards to a piece, but you never know what you are going to get.

Q. And 36 inches?

A. That is 36 inches, is the widest we carry.

Q. What is the maximum length?

A. What is the length of the remnant piece?

Q. Yes.

A. I just explained. It will run anywhere from a yard and a quarter up to ten yards; sometimes a little more, sometimes less.

Q. Since your remnants—you have testified they may be used in making blouses and skirts, and the like—would the pattern be of any use in making up those remnants into wearing apparel?

A. I don't think the women could very well make them blind, without a pattern.

Q. I see. Then your answer is that they would?

A. They should require the majority of use with a pattern.

Q. What about your catalogs? Do you have catalogs in your store?

A. Yes.

Q. Simplicity catalogs I am speaking of.

A. We have two catalogs.

Q. You have two?

A. That is right.

Q. How often do you get them in?

A. I think it is every month.

Q. Every month?

A. That is right.

[fol. 185] Q. And they are made available where the prospective purchaser can look at them?

A. That is correct. They sit up on top of the counter.

Q. Well, now, do your patterns have any connection with the sale of your notions? That is, the sewing material end of your notions?

A. Well, our notions business—that is, the sewing part of the notions—would be great, even without the patterns. But the patterns do help sell some sewing supplies, because a woman comes in and she—

Q. Do help sell what?

A. Sewing supplies.

Q. You mean sewing notions?

A. That is right.

—because she comes in to buy threads, and she sees the pattern book, starts thumbing through it. She might see something she wants, or maybe she will get another idea, and go somewhere else.

Q. The Kresge store at 3179—would you call that a medium-size store, or a large store?

A. As what type of store? A variety store?

Q. As a 10-cent store goes. Is that what you call them?

A. Variety stores. We are a good medium-sized store, both in lineal feet, and in volume. Because we carry high-priced merchandise in addition to low-priced, which makes a difference in volume.

Mr. Smith: That is all.

Hearing Examiner Pack: Mr. Simon?

Cross examination.

By Mr. Simon:

Q. Is this remnant stock of yours a \$300 stock, selling for 50 cents a yard or less?

A. Yes, that is all remnant stock. That is the only thing we carry. We are listed on our company office as a remnant store, insofar as yard goods are concerned.

Q. Is your inventory of remnants approximately \$300?

A. That is right. Sometimes they get slightly over, and maybe next week they go down a bit. It fluctuates.

[fol. 186] Q. When you get a new shipment, it might be a little less than \$300, sometimes a little over?

A. Are you referring to the total amount of piece goods we carry?

Q. I am talking about these remnants used with patterns. That is \$300?

A. That is right.

Q. It sells for 50 cents a yard or less?

A. Anything that is not drapery material is less than 50 cents. We don't have anything over 50 cents.

Q. Most of it is 29 cents?

A. From 29 cents to 39 cents.

Q. Does Kresge, in your store at least, carry patterns for sale of other merchandise, or do you carry them to make a profit on the sale of the pattern?

A. We sell everything in the store to make a profit on them.

Q. Is that what you sell patterns for, to make a profit?

A. I believe so. We would sell horseshoes to make a profit.

Q. You would drop them if you weren't making money on them?

A. Yes.

Q. That is the nature of your operation.

Your particular type of operation is a large number of small items, with a minimum of service?

A. That is right. Volume of turnover on merchandise.

Q. There has been some talk here on cabinets, and I think there is a little confusion there.

You don't have any cabinets in the sense that Mr. Fliess described cabinets a minute ago, do you?

A. No. Ours is just a metal drawer in our under-stock, under the counter, out of sight of the customer.

Q. It is really just a tin box?

A. That is right.

Q. Would you estimate the value of it at more than a dollar or two?

A. I don't know. After you get through using them, I don't know if they would be worth anything to anybody else.

Q. But it isn't a drawer, or anything, just a tin box sitting under the counter?

A. That is right. It is not fancy, just a plain brown-stained drawer.

Q. Not a cabinet, where the drawers roll out on roller bearings?

A. That is right.

[fol. 187] We set the drawers one on top of the other, under the counter.

Q. Now, you said you had a \$800 stock of patterns. That is \$800 in retail?

A. Right.

Q. About \$525 wholesale?

A. That is right.

Q. It is half stock?

A. We don't carry everything in the catalog book.

Q. You carry a half stock?

A. I guess it amounts to that.

Q. You have a half stock of Simplicity patterns, and no others?

A. That is right.

People come in and want certain numbers in the book, and we can't accommodate them.

Mr. Simon: I have no further questions.

Hearing Examiner Pack: Mr. Smith, have you anything further?

Mr. Smith: Yes.

Redirect examination.

By Mr. Smith:

Q. That is liable to happen in any store, that they come in and ask for a pattern not in the book, and you would have to order?

A. No; there are certain numbers in that book that we do not even order.

In other words, there are certain lines or numbers in there, certain groupings, that we just don't carry at all.

Q. What kind do you carry?

A. We carry all of what they call the common set-up. In other words, the better numbers, but if there is something special, as they list it, in parts of the catalog under certain group numbers we do not carry them.

Q. What do you mean "special"?

A. Every pattern has a number in the book. In that catalog there are numbers listed in *their* with pictures, that we do not carry at all.

Q. You mean something like a lady's dinner dress?

A. Say something like that, yes, or an evening gown of a [fol. 188] particular type. But it is in a certain grouping. But we have the basic stock.

Q. That constitutes the bulk of the pattern business?

A. Probably, as far as the Simplicity pattern line is concerned, it might run 60 per cent of the assortment, but whether it runs 60 per cent of the volume I don't know. But it might run 60 or 65 per cent of their stock.

Q. That 60 per cent is selective, is it not?

A. What do you mean by that?

Q. You have 100 per cent; you say you have 60 per cent. That 60 per cent must be selected on some basis.

A. It is selected by Simplicity. In other words, they send out new numbers for our catalog.

Q. Doesn't Kresge have the right to order what type of pattern they think will most readily sell, as you have described it?

A. When Simplicity gets out these new patterns, and they send out the book, they send out the numbers for the basic stock.

Q. What I want is some more light on this basic stock. Does that constitute the types of patterns that are most generally called for?

A. That is the bulk of the business.

Q. The bulk of the business?

A. That is right.

Q. You spoke of your inventory of yard goods. Do you have any idea of the inventory of your notions in the sewing line?

A. You mean other than patterns?

Q. Yes.

A. Well, sometimes we will get in \$300 worth of thread, sometimes \$50 worth of thread, not counting the stock we already have on hand, and not counting the needles. We may run anywhere from \$700 to \$1,000 worth of the other sewing items, including thread.

Q. That is zippers and thread and buttons, et cetera?

A. That is right.

Q. So then, your patterns that you sell have a more direct relationship to the sale of your notions?

A. To the stock on hand, but not to the turnover. We'll turn over the other goods many times that year. We don't turn over patterns.

[fol. 189] Q. I wasn't talking about the turnover. I was talking about the relationship in sales, not investments. Do you get what I am driving at?

A. You had better go back to the beginning, because I am wondering where you're coming out, whether you mean to the total sales in patterns, or my investment in patterns.

Q. I am not talking about investment. You have already stated what your investment in patterns was. I didn't want you to repeat that.

A. No.

Q. My question was: In the sale of your patterns, does it have the most direct relationship to the sale of your notions?

A. Yes, but there has been nothing come up about the sale of patterns; it has only been my investment in patterns, and my investment in notions.

Did you ask me for the sales? I didn't give you any sales figures on patterns.

Q. I am speaking of the relationship in the day-to-day sale of patterns and notions. Do they have a direct connection with each other?

A. They have a direct connection, yes.

Q. If you didn't sell notions, you wouldn't sell as many patterns, would you?

A. That is correct.

Recross examination.

By Mr. Simon:

Q. Mr. Smith asked you some questions about basic stock. I take it you are talking about your basic stock?

A. That is right.

Q. Your basic stock is a half stock of Simplicity's over-all pattern line?

A. That is evidently what it amounts to, because we don't have every pattern in the book.

Q. Mr. Smith talked about this relationship between needles and thread and patterns. Do you carry patterns to make a sale of needles and thread, and everything else, or do you carry patterns to make a profit on the sale of the patterns?

A. We carry everything to make a profit.

[fol. 190] Q. Each one is carried to make a profit on that particular item?

A. Right.

Q. Each one stand on its own feet in your store?

A. That is correct.

Mr. Smith: That is all I have.

Further Direct examination.

By Mr. Smith:

Q. But the notions are an aid to the sale of your patterns?

A. That is right.

Further Recross examination.

By Mr. Simon:

Q. Mr. Phillips, in that sense, is the hot dog counter an aid to the sale of notions?

A. No.

Q. Doesn't everything in the store, in a sense help to sell everything else?

A. That is the idea behind a variety store.

Mr. Smith: What about the hot dog counter?

Mr. Simon: You know, hot dog, with mustard.

Mr. Smith: Does he have one in his store?

By Mr. Simon:

Q. Do you, Mr. Phillips?

A. Yes.

Q. Doesn't the sale of everything in your store help the sale of everything else?

A. Yes; they will come in the store and look around.

Mr. Smith: Is the relationship between selling a hot dog and selling notions and patterns the same?

The Witness: Is the relationship the same?

Mr. Smith: That is what he is trying to show.

The Witness: In this respect: No matter what a customer comes in to our store for, it is visual selling.

Mr. Smith: But a hot dog has nothing to do with sewing or making a dress?

The Witness: Not in the strict sense of the word, but [fol. 191] whatever you sell in the store is going to help sell something else.

Mr. Smith: But the sewing notions and patterns have a direct relationship to each other?

The Witness: They are direct. They are related. The same as hardware and tools.

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D. W. DAVIES, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. You are manager, I believe, of the F. W. Woolworth Store at 7207 Wisconsin Avenue, Bethesda?

A. That is right.

Q. How long have you been manager?

A. Of that store?

A. Yes.

A. Three and a half years.

Q. Do you sell Simplicity Patterns in that store?

A. Yes, we do.

Q. How long have you been selling those patterns?

A. They had been selling them before I arrived at the store. I don't know how many years, but they have been selling them since I came.

Q. The store was there some considerable time before you became manager?

A. About eighteen or twenty years.

Q. Do you know what size stock of Simplicity Patterns that store carries?

A. No, I don't, sir. I know it is not the complete stock according to the pattern books but I don't know exactly what stock it is.

Q. Would you say it is the basic stock?

A. Yes, I would.

Q. Does the basic stock include those patterns which are usually most in demand by women?

A. I believe so.

Q. Does the Woolworth store have Simplicity catalogs in connection with the sale of those patterns?

A. Yes, we do.

[fol. 192] Q. How many catalogs do they have?

A. Two.

Q. Do they get two new ones in each month?

A. That is right.

Q. Does that store sell notions?

A. Yes, sir.

Q. What do you put in the category of notions?

A. Well, we have sewing notions. That is one subdivision. We have purses, belts, etc.

Q. I am speaking of the sewing.

A. Well, sewing notions are threads, needles, Dritz line of accessories.

Q. How do you spell that?

A. D-r-i-t-z. Dritz.

Q. What is that?

A. That is a brand name for seam rippers, button kits, skirt markers, and merchandise that is used to make dresses and such items.

Q. All right, go ahead.

A. And Talons.

Q. Zippers, you mean?

A. Yes. Buttons; that is about it.

Q. Do you have any idea about what volume of pattern business that store does?

A. No; I don't.

Mr. Smith: That is all.

Cross-examination.

By Mr. Simon:

Q. Mr. Davies, do you have a fabric department?

A. No, we don't.

Q. You don't sell fabrics?

A. No, we had a few remnants that came in this spring that were assigned. I didn't buy them; but we haven't sold any of them to speak of.

Q. About how many dollars worth of remnants have you sold in the last two years?

A. Oh, I would say twenty or thirty dollars at the most.

Q. Twenty or thirty dollars in two years?

A. Yes.

Q. That is not \$20 a month? Twenty or thirty dollars over a period of two years.

A. Well, we have had two assignments of remnants. Although we gave them adequate space as a feature, they didn't produce. As a matter of fact, it is going to be embarrassing when we have annual inventory next month and I am stuck with those remnants.

Q. But twenty or thirty dollars in the last two years?

A. I think so.

[fol. 193] Q. No dress fabrics?

A. None whatsoever.

Q. Do you keep these patterns in cabinets or in tin boxes under the counter?

A. Tin boxes, etc.

Q. Do you have any—do you know what is going to be sold in your store, or is that decided in New York?

A. Decided in New York.

Q. All you do is send in post cards reordering patterns?

A. That is right.

Mr. Simon: That is all.

Redirect examination.

By Mr. Smith:

Q. Mr. Davies, you say you have these patterns in tin boxes. What do you mean by tin boxes? Something you can bend with your fingers?

A. If you would take a look at those boxes right now you would say, yes. It is nothing I would want to put on the counter; but they are a light metal box.

Q. They are made out of steel, aren't they?

A. I don't know. I am not an authority on metals but they are awfully flimsy.

Q. How many do you have?

A. I would say about six or seven.

Q. Do you know how many patterns each container holds?

A. I wouldn't want to make a guess.

Q. How many notions do you sell? You can state it either way you want, by month or year. What is the volume? Sewing notions, that is?

A. I can't break them down.

Q. You know about the remnants but you don't know about the notions.

A. I know, but remnants come in on what we call an assignment sheet. It is new merchandise. As new merchandise, we have a ten and thirty day folder that we check new merchandise on. That is an individual item.

But as far as breaking down how many sewing notions I sell in relation to the rest of the department, I can't do it.

[fol. 194] Q. Do you sell a hundred dollars worth a year or a thousand or two thousand? Approximate it as best you can. Sewing notions.

A. It is above two thousand.

Q. Above \$2000?

A. Right.

Q. In sewing notions?

A. That is right.

Q. Are sewing notions located immediately adjacent to the pattern department?

A. Well, the pattern department, as far as the customer see it, consists of one book on the counter. It is located in the sewing notions subdivision, yes.

Q. Your two catalogs are located in the center of the sewing notions subdivision?

A. That is right.

Q. Why did you put the catalog in the center of the sewing notions rather than somewhere else? The Simplicity catalog, that is.

A. That is pretty simple. That is part of that department, that subdivision.

Q. All part of the same department, isn't it?

A. That is right.

Mr. Smith: That is all.

Hearing Examiner Pack: Anything further, Mr. Simon?

Mr. Simon: No, sir.

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H. B. SMITH, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. Mr. Smith, where do you live?

A. 1326 57th Avenue, Hillside, Maryland.

Q. How long have you been manager of the Woolworth store at 406 Seventh Street?

A. Two and a half years.

Q. Does that store sell Simplicity Patterns?

A. Yes, sir.

Q. How long have they been selling?

A. I couldn't answer, sir. Long before I went there.

[fol. 195] Q. Would you say many years before you went there?

A. Oh, Yes, I would say so.

Q. Where do they keep these patterns?

A. Under the counter.

Q. What in?

A. Metal boxes.

Q. Metal boxes?

A. And a few cardboard ones when we don't have enough metal ones.

Q. How many of those boxes, metal boxes do you have?

A. I don't know, sir.

Q. Well, is it one or two or five?

A. If I knew I would tell you. I don't know. I could guess. Would you like me to guess?

Mr. Simon: I have no objection to guessing.

The Witness: I would say ten.

By Mr. Smith:

Q. Ten. Do you know about how many patterns are contained in each container?

A. No, sir.

Q. Do you know approximately how many?

A. No, sir.

Q. Do you know—do you carry the basic stock of patterns in that store?

A. No, sir.

Q. What stock do you carry?

A. I couldn't answer that, sir, I don't know.

Q. If you don't know, how do you know you don't carry the basic stock?

A. I don't know that I don't carry the basic stock. I don't know what the basic stock is.

Q. Well, if you don't know what the basic stock is, I believe you said you don't know what type of patterns you do sell.

A. Repeat that, please.

Q. Do you know what type of patterns you do sell?

A. Explain type.

Q. I don't know, you should know. You are the manager.

A. I know what brand I carry.

Q. I know, but Mr. Simon here has brought out that some of these ten-cent stores don't carry a full line. What I am trying to get at is what you carry, what you do sell.

A. I sell the assortment that was selected for me, I suppose, by my buyer in New York City. I don't know. I [for 196] couldn't say. That was arranged for me and was sent to me and I sell it. That is all I know about it.

Q. But you have no idea about the amount of inventory or volume of sales of Simplicity Patterns?

A. It would only be a guess. I don't know.

Q. Well, let's have it.

✓ A. I would guess that the pattern sales probably would be maybe 400 a year. I don't know.

Q. That is just a guess, is it?

A. That is just a guess, yes, sir.

Q. Who would know?

A. How much I sell here?

Q. Yes.

A. Oh, I guess Simplicity would know.

Q. How much that store sells?

A. I would imagine they would.

Q. Do you know whether or not you have catalogs?

A. Yes, sir, we do.

Q. How many do you have?

A. I think two.

Q. That is Simplicity catalogs I am talking about.

A. That is correct.

Q. You get two new catalogs each month?

A. Yes, sir.

Q. What about notions? Do the stores sell notions?
Sewing notions?

A. Sewing notions, yes, sir.

Q. What is your idea of sewing notions? Will you describe them briefly?

A. All the accessories for sewing.

Q. Well, tell us what some of them are.

A. All right, I will tell you. Buttons, threads, pins, needles, thimbles, bias tapes, measuring tapes, skirt markers, skirt chalk, snaps, safety pins.

Q. Zippers?

A. Zippers, thread.

Q. What do you estimate your volume of sales in sewing notions is?

A. That would only be a guess, too, sir.

Q. What do you think it is?

A. I think it might be seven or eight thousand dollars a year. I don't know.

Q. Now, are your sewing notions located in your store adjacent to your Simplicity Pattern stock?

A. Well, they are on the same counter. The patterns are under the counter that the sewing notions are on, yes, sir.

[fol. 197] Q. The patterns are stored under the counter in which the sewing notions are displayed over the counter. Is that right?

A. That is right. We have some sewing notions under the counter, too. We carry an under stock of quite a few items.

Q. If the customer comes in and wants a pattern, your clerk reaches in and opens up the storage department and gets out a pattern. Is that right?

A. That is right.

Q. What is your reason for having your pattern book located on the same counter where your sewing notions are?

A. Well, it is in the same department. We keep our merchandise classified and each department is usually displayed all at the same place.

Mr. Smith: All right, sir.

Cross-examination.

By Mr. Simon:

Q. Do you have any fabrics in your store?

A. No, sir.

Q. None at all.

A. No, sir.

Q. All your decisions on patterns are made for you in New York.

A. Yes, sir.

Q. All you do is when you sell a pattern, fill in a number on a post card and send it in for replacement?

A. Yes, sir.

Q. That is all you do?

A. All I do.

Mr. Simon: Thank you.

Hearing Examiner Pack: Anything further, Mr. Smith?

Redirect examination.

By Mr. Smith:

Q. By having your patterns and notions in the same department, you consider, do you not, that the sale of notions

and patterns is directly connected with each other. Is that right?

A. I might say that on the same counter that I have the sewing notions, I also have wallets, purses, belts, shoe strings, change purses and some other items. Incidentally, the patterns in my store separate the wallets from the sewing notions. They are sort of a division.

[fol. 198] Q. The sewing notions are all together?

A. What do you mean—no, I don't think so. Technically, buttons are on one side of the counter and some other of the sewing notions are on the other side of the counter.

Q. How wide or long a counter is it?

A. About twenty-six feet long; thirty-three inches wide.

Q. You say, you have your Simplicity catalogs on the counter, then, separating—

A. It is at one end of the sewing notions, let's say.

Q. Is that because you think that the customers coming in there interested in the patterns are also interested in sewing notions, or interested in sewing notions are also interested in a pattern? Isn't that true?

A. Well, not altogether. Not necessarily. We put them there, as I said before, because mainly merchandise is classified in different departments and we have to keep the merchandise in its own department so far as we possibly can.

You can go into a competition store—a competitor of ours has merchandise classified differently, and you will find their displays are different.

Q. Well, there must be some purpose to this classification. You classify merchandise because it is allied or associated with different items, or that are allied or associated with one another.

A. Yes, my company says it is. That is one reason they are classified.

Mr. Smith: That is all.



GEORGE PULLMAN, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. Are you employed by Simplicity Pattern Company?

A. Yes, sir.

[fol. 199] Q. In what capacity?

A. Salesman.

Q. What is your territory?

A. Middle Atlantic states. That would include, New Jersey, Pennsylvania, Washington, Maryland, Virginia, West Virginia.

Q. You mean you have just one salesman for all those states?

A. Yes, sir.

Q. You have heard the testimony of four witnesses who appeared yesterday and today who have testified that you and Mr. William Simon here, came to their places of business in the last few days and talked to them about this case, have you not?

A. Yes, sir.

Q. Did you try to convince these people that you did talk to them by argument or otherwise that their businesses were not in competition with chain stores?

A. No, I had told them how I felt about it.

Q. What did you tell them you felt.

A. I felt the chain stores did not interfere with them at all but, as a matter of fact, would help them. The impulse sale, as a matter of general fact, helps those merchants.

Q. Did you tell them that, in your opinion, their pattern business was not in competition with the chain store business?

A: Yes.

Mr. Smith: One and two. All right. Mr. Reporter, will you please copy paragraphs 1 and 2, copy that letter through, that is the heading down through paragraph 2 into the record?

Hearing Examiner Pack: I take it there is no objection to that, Mr. Simon?

[fol. 200] Mr. Simon: No, sir, I think the whole letter should go in but I have no objection to part of it going in.

Hearing Examiner Pack: If you will please copy the paragraphs in the letter, as requested by Mr. Smith, those numbered one and two. I believe paragraph 2 has some subparagraphs, has it not?

Mr. Smith: Yes.

Hearing Examiner Pack: You wish of course the subparagraphs copied as a part of the portion which is now to be incorporated in the transcript?

Mr. Smith: Yes.

Hearing Examiner Pack: That disposes of those two items.

(The letter referred to is as follows:)

1. Respondent's total sales for the year 1951 were \$11,108,388.

2. "The net dollar volume of the following items sold by respondent during 1951 were (a) patterns, net after discounts and allowances, \$8,142,180. (b) Counter catalogs, \$429,129. (c) Fashion previews, \$606,163."

JAMES J. SHAPIRO, was thereupon called as a witness and, having been first duly sworn, testified as follows:

Hearing Examiner Paek: You may proceed with the examination of Mr. Shapiro.

Direct examination.

By Mr. Smith:

Q. Mr. Shapiro, you are president of the Simplicity Pattern Company of New York, the respondent in this case, are you not, sir?

A. Yes, sir.

[fol. 201] Q. How long have you been president of the company, Mr. Shapiro?

A. Since 1949.

Q. Mr. Shapiro, did the Simplicity Pattern Company at any time operate a factory at Niles, Michigan?

A. It does operate a factory in Niles, Michigan.

Q. How long has that factory been in operation, sir?

A. Since the early 1930s. I couldn't tell you the exact year. I would probably say 1932.

Q. What is the nature of the operations at that factory?

A. We have a printing plant. We have two paper machines. And some envelope making machines and various other equipment to print patterns, envelopes, instruction sheets, certain of our publications and we cut and fold and ship patterns to various parts of the country and to our own warehouses.

Q. Mr. Shapiro, does Simplicity—and when I say Simplicity I mean Simplicity Pattern Company—did they ever operate a factory of any kind in Terre Haute, Indiana?

A. We did, sir, it is not operating now.

Q. When was it discontinued?

A. I would say three years ago. We added onto our Niles structure and absorbed those operations that we had in the Terre Haute factory into our Niles operation.

Q. I see. Then at the Niles, Michigan plant, that is where you operate a paper mill, printing plant and engraving plant, bindery, and cutting and folding department?

A. We do, sir. Our entire manufacturing operation in the United States is in Niles.

Q. And that work is for the manufacturer of patterns, dress patterns?

A. I am sorry, sir, I don't quite understand.

Q. That is in connection with the manufacture of dress patterns?

A. Dress patterns and certain publications and ancillary material relative to our pattern business.

Q. Is the Simplicity Pattern Company engaged in any other kinds of business other than the manufacture and sale of dress patterns?

A. We publish and sell magazines.

[fol. 202] Q. Are the magazines in connection with the sale or connected with the sale of the dress patterns or how would you describe that?

A. They feature Simplicity patterns. Their purposes are multiple.

Q. What I am trying to get at is that your magazines are not foreign to the sale of dress patterns but are connected with the sale of dress patterns. Is that true or not?

A. I don't think I could answer it with any yes or no, Mr. Smith. One of our publications is an educational publication. Its purpose is to help home economists, teachers how to teach sewing, improved methods and other projects of that nature. We do use Simplicity patterns to illustrate certain things and we do have Simplicity patterns illustrated in fabrics and other means in the magazine. It is not a fashion magazine per se.

Q. Is it not true, Mr. Shapiro, that the teaching of sewing you have spoken of, its purpose, it is to stimulate the sale of Simplicity dress patterns, isn't that true?

A. I think it is integrated with the total problem of teaching home sewing in order to have a market for our goods at future times.

Q. Now the company issues new counter catalogs monthly for the use of its dealers in the sale of patterns, is that true or not?

A. Yes, sir.

Q. Will you describe briefly what a counter catalog is?

A. Yes, sir. I don't know if we have one. Is it proper to show one?

Mr. Simon: We don't have one.

Mr. Smith: I don't have one either.

The Witness: A counter catalog is a book containing approximately five hundred pages which illustrates all the designs that compromise the Simplicity pattern line. This catalog is subdivided into various categories, such as Women's, Children's, Men's Wear, Juniors, Half-sizes, etc., etc.

The illustrations of the Simplicity designs are all done in four colors throughout. We sometimes use art work, we sometimes use color photography in order to show the designs in their natural fabrics and in order to give the effect to the consumer looking through the catalog of what our designs would make up when completed.

By Mr. Smith:

Q. They contain illustrations of the current patterns. Is that why they are issued monthly, so they will keep current?

A. The merchant has a pattern stock which is comprised of roughly 600 different designs. Each month we issue new designs and consequently the catalog is reissued and designs are added to the month's previous quantity. Furthermore, the books have a certain amount of wear and tear. And therefore it is desirable not merely to add supplements but to place clean and fresh books periodically on the stores' counters.

Also within the period, within any period we reshuffle the designs for seasonal and other and dramatization purposes, and that is why we issue a catalog monthly.

The catalog shows everything we make at any given period.

Q. And designs discontinued are left out of new catalogs?

A. When we issue a discard which is three times a year we remove non-salable designs and discard the patterns for them and of course leave the pages out of subsequent issues of the catalog and give the dealer credit for these discards.

Q. Are these patterns catalogs, are they necessary to the sale of patterns in a retail store?

A. Yes, sir.

Q. The Simplicity Company also publishes monthly smaller catalogs known as fashion previews, do they not?

A. I couldn't agree with that being a catalog. It is an eight page.

Q. Just describe it in your own language, what a preview is.

A. I would describe it as a pamphlet printed on newspaper stock, printed in color showing the latest or a sprinkling of the latest designs and fabrics of that particular period or some item or items that we or the merchant normally would wish to promote at that particular time, such as Easter or back to school or Christmas time [fol. 204] and the merchants get these in various quantities and distribute them to stimulate his piecegoods and pattern business and to advertise his store.

Q. How often are the previews issued?

A. Monthly, sir.

Q. And they are given without charge by dealers to their customers, is that true?

A. That is true, sir.

Q. Your patterns and promotional material which you have described. When I say your, I mean Simplicity Pattern Company—including Cabinets, in which the patterns are housed or stored in the store, are shipped and transported from the company's factories to thousands of merchants and to respondents warehouses located throughout the country? Is that true?

A. I don't understand the question, Mr. Smith. You mentioned cabinets and promotion material. I am not quite sure what you want to know.

Q. I will break the question down for you.

A. Please.

Q. Your patterns and promotions material, you have testified that they are all manufactured in Niles, Michigan.

A. Right.

Q. Yes. Well, that material is shipped and transported from Niles, Michigan to thousands of merchants and to your warehouses throughout the country. Is that true?

A. I don't know if I can answer it that simply. The re-orders, that is the patterns, the merchants order daily, he orders from our local warehouse. His monthly shipments

of new designs come to him from Niles. Any promotional material, such as posters or previews or catalogs, not necessarily promotional material, any material accompanying his monthly shipment, comes to him from Niles at the time that the monthly order is set, is sent to him.

Q. Now I take it that all initial stocks and monthly shipments are sent from Niles, Michigan?

A. Yes, sir.

Q. Throughout the United States?

A. That is right, sir.

Q. Direct to the merchants?

A. Direct to the—

Q. Sir?

A. And—are sent from Niles, Michigan direct to the merchant.

[fol. 205] Q. Yes, sir.

A. Allowing for technicalities, such as break up pool shipments or other things of that kind, which I make allowance for.

Q. Did I understand you to say that re-orders, which may include just a pattern or two or three patterns are shipped from the company's warehouses?

A. It isn't two or three patterns. The merchants—

Q. Re-orders.

A. It is presumed that the merchant at the end of each day re-orders that which he has sold during the day in order to replenish his stock. Those patterns—and he does order them 15 to 20 times a month if not exactly every day, he orders from his nearest warehouse.

Q. How many warehouses does it have, does the company have?

A. New York, Atlanta, Dallas, San Francisco, and Niles acts as the Midwest warehouse.

Q. Do you know how many states the New York warehouse covers?

A. Exactly, sir.

Q. Well approximately.

A. I could find out very easily, but I don't know offhand.

Q. It is a number of states, isn't it?

A. It covers—

Q. Each of your warehouses cover a number of states, don't they?

A. They do, sir.

Q. Well, now, where do you get your cabinets from?

A. We have them—we get them from a cabinet manufacturer, a steel fabricating company.

Q. Where is he located?

A. I don't really know. I would guess in Pennsylvania, but I am not sure.

Q. How does the customer get the cabinets? Are the cabinets sent by the manufacturer to Simplicity and then in turn Simplicity sends them to the customer or just how does that work?

A. Well, the customer generally gets his cabinets at the time he installs a Simplicity pattern stock. The steel fabricating company sends us a quantity of cabinets of various types and descriptions to suit the customer's different needs and when an order comes for the opening of [fol. 206] the new store, that is in due course transmitted to Niles, who must fill these cabinets with a stock of patterns, according to the requirements of that particular order. Then the patterns included in the cabinets are shipped to this merchant and that is how he gets his cabinets.

Any different handling of cabinets would be because of replacement during the course of the merchants' years of doing business through loss, breakage or obsolescence in one form or another. I believe that our shipment would always be from Simplicity and not from the cabinet manufacturer because I am sure they don't carry inventory for us.

Q. Are those cabinets, as I take it, they are purchased outright by Simplicity from a Cabinet manufacturer, whoever he may be?

A. Yes, we do.

Q. And I take it also that Simplicity has a warehouse to store them in Niles, Michigan?

A. Yes, we store them in Niles, Michigan. We may store a few in various of our offices but not enough to make any point about it.

Q. And then when the customer opens up a new account, or for any other reason needs the cabinet?

That is I am speaking of storage for dress patterns, then he gets it from Simplicity's warehouse at Niles, Michigan, is that right?

A. Yes.

Q. And it is shipped from Niles, Michigan or transported to wherever the merchant might be all over the United States?

A. Yes, sir.

Q. What is it, was Simplicity the first manufacturer of dress patterns to sell to the so-called Ten Cent or Syndicate stores? Do you know?

A. We were the first to sell to the large syndicate stores whose names we commonly know.

Q. Can you name some of them?

A. Yes, sir. F. W. Woolworth, S. S. Kresge, S. S. Kress, Newberry, MacClellan, do you wish any more?

Q. Well, if there are not too many. I don't want to take up too much time on it.

A. G. C. Murphy, Neisher. That is about all that some to mind, at the moment.

[fol. 207] Q. I am not sure that I heard whether or not you said first whether Simplicity was the first to sell them.

A. I believe we were the first, sir.

Q. The biggest of the Woolworth stores, how do you rank them in order? Will you just give us several of them? Does Woolworth come first in size?

A. Are you referring to the chain as a whole?

Q. Yes, sir.

A. F. W. Woolworth Company is the largest of the variety chains.

Q. Where does Kresge Company stand? Which is the second largest?

A. Of those that we do business with, the Kresge Company would rate second I believe.

Q. Do you know who would rank third?

A. No, but I do have a copy of Forbes Magazine current issue who does an article on various variety stores and I do believe they list the variety chains. I could refer to it.

Q. I would rather for you to just testify from what you know, because I can't take time to look at Forbes.

A. It would be quicker. I couldn't tell you the exact dollar volume or the comparative volume that these syndicates do, Mr. Smith.

Q. Originally the Simplicity granted these ten syndicate stores an additional discount of 6 percent on their purchases of patterns, did they not?

A. Yes, sir, as prices went up, prices went up to these syndicates as well.

And in the case of these variety chains, these 6 percent additional discounts were removed some years ago.

Q. That was in '46, wasn't it?

A. I believe so.

Q. In 1939 the pattern industry sold about 45,000,000 patterns, is that about what your recollection is?

A. I believe that to be correct.

Q. Of which Simplicity sold around approximately 21,000,000?

A. I believe that to be correct.

Q. Now, in 1951 the pattern industry sold about 82,000,000 patterns, is that about right?

A. It is about right.

[fol. 208] Q. Of which Simplicity Patterns sold about 46,000,000, is that right?

A. That is about right.

When you mention "the pattern industry" you are including all patterns made, or just the five more popularly known patterns that sell at retail?

Q. Well, as far as I know it means—it means—"the industry" would mean everybody.

A. I think that—

Q. That word, I think, would imply that.

A. Well, there are more patterns sold, then, I must correct my statement and say that more patterns were sold.

Q. Well, if you have a different idea of "industry" you can give us what your idea is. I want to know.

A. There are several manufacturers who—three, I believe, important ones—who manufacture paper patterns only for newspapers and other periodicals of that kind. They have a volume in excess of at least 10,000,000 patterns.

Q. What that true in 1939?

A. Yes, that was true then, as it is now.

Q. Well, then, the figures you have just given of 45,000,000 in 1939 and 82,000,000 in 1951, what would they include?

A. I don't believe that those figures included those newspaper patterns.

Q. Well, what would they include?

A. They would largely—they would be—they would re-

flect the sales of perhaps the five companies commonly associated with patterns at retail—Vogue, McCall, Butterick, Advance, Simplicity.

Q. Is it true that at the end of 1952, 34% of Simplicity's pattern sales were made to chain and 10-cent stores and mail order houses?

A. I would have to refer to my notes, Mr. Smith, because I do get confused between the years.

Q. You go right ahead. That is all right, sir.

A. May I ask you to repeat the question?

Mr. Smith: Will the Reporter read the question back?

(The question was read.)

The Witness: It sounds correct to me, sir. I cannot authenticate that percentage because the figures I have here [fol. 209] refer only to the variety, and you have mentioned the mail order companies as well.

By Mr. Smith:

Q. Well, mail order houses.

A. Mail order houses, by which I presume you refer to Montgomery Ward and Sears Roebuck, and my figures here relate to the variety stores as such and the segments that I have given you. I don't have the figure—the figure does not—the figure sounds reasonably so, reasonably correct.

Q. Well, I would like the record to be clear on just what your ideas are as to what that 34% is. Do you want included Sears Roebuck and Montgomery Ward?

A. I have following figures to submit, Mr. Smith.

In 1951, 32% of our business was with the so-called variety stores, 5-and-10¢-stores.

In 1954, 24% of our volume was with the same group of stores.

I don't have the figures here for 1952 but I would presume that it would be somewhere between the 32% and the 24% because our volume against our total volume has been shrinking in this category.

Q. I see.

Now, in entering into contracts with purchasers, the company employs various code letters to identify the types of stock initially purchased, is that correct?

A. Yes.

Q. Well, does the code indicate one of each medium size in each style that retails at 25¢ and 35¢—

Mr. Simon: May I interrupt? There are a whole long list of these code numbers and I have a sheet of paper which lists the codes and what they mean, and I would be happy to stipulate, introduce that in evidence, because I am not sure that the witness would remember all the codes.

(After distributing documents)

My reason for making this suggestion, Judge, is what Mr. Smith is reading from is the code list of 1952, and [fol. 210] there have since been some changes in the code and what I handed Mr. Smith and your Honor is the current code.

Mr. Smith: All right. That is agreeable.

Hearing Examiner Pack: Mr. Reporter, let a copy of the paper be marked for identification as Commission Exhibit 43; and by agreement it is received in evidence under that number.

(The document referred to was marked Commission's 43 for identification.)

Mr. Smith: Your Honor, that covers all of the matters referred in our letter of March 17, 1955, with the exception of the identification of the documents, which has already been fixed here.

Hearing Examiner Pack: Then that concludes your examination of Mr. Shapiro?

Mr. Smith: As to that, this letter. I have one or two other matters I would like to take up with him.

Hearing Examiner Pack: All right, sir. We will take a five minute recess first.

(A recess was taken)

Hearing Examiner Pack: On the record. Go ahead Mr. Smith.

By Mr. Smith:

Q. Mr. Shapiro, do you know what type of patterns the Woolworth stores sell, the price range, Simplicity Patterns?

A. Yes, sir.

Q. Will you state that, please?

A. The Simplicity pattern price range is 25¢, 35¢ and 50¢. F. W. Woolworth stores carry all of those patterns. As far as the price range, the size of the stock depends on the size of the store.

Q. You mean, the bigger stores carry bigger stocks?

A. Yes, sir.

Q. What about Kresge, what price range do they operate in?

A. The same.

[fol. 211] Q. The same; and the other chains, too?

A. All of our merchants do.

Q. All of them do?

A. At one time, Mr. Smith, when we introduced the 50¢ pattern, not all stores had them. This was some years ago.

Since then, the pricing, as far as its application to the stock within the price range, is the same for all merchants.

Q. Well, the Woolworth stores and most of the chains carry a pretty full line of your patterns?

A. All stores carry patterns in one or another category, as listed on that sheet, sir. The size—

Q. What sheet are you talking about? A. The one that lists the code symbols, sir.

Hearing Examiner Pack: That is Commission Exhibit No. 43.—

The Witness: And the size of this stock, to which there is a code symbol, applies to the size of the store, not whether it is a chain store or department store or a smaller dealer.

By Mr. Smith:

Q. The size of the stock you say?

A. Depends on the size of the store, sir.

Q. They all carry some of these patterns here appearing on Commission Exhibit No. 43, is that right? Is that what you said?

A. I am sorry, I didn't understand your question. These are the only categories we have, whether they be—

Q. When you say "these, you see, we have got to get this clear in the record. Refer to the Commission Exhibit number, if you please, sir."

A. Oh, I am sorry. The stocks as symbolized by the code numbers on Commission Exhibit CX 43 would refer to the size of stock that a store carries, depending on the size of the store, not on the kind of store it is and that does not vary.

Q. Do you mean when you say, "size of stock" you mean the number of patterns?

A. Number of patterns.

[fol.212] Q. Would they carry the full line appearing on Commission Exhibit 43?

A. Full line within the category designated.

Q. I see. Does the Simplicity Pattern Company still furnish free catalogs to the Woolworth stores?

A. Yes.

Q. And free cabinets?

A. There is a difference between the various types of cabinets that merchants use.

We do supply a type of cabinet for the Woolworth Company trade.

Q. How about Kresge?

A. Yes, sir, the same applies.

Q. Does that apply to the other chains, to syndicate stores?

A. The so-called variety chains and it applies to all of those that I enumerated in my previous remarks.

Q. Do you still pay free transportation, still furnish transportation free to Woolworth stores?

I mean transportation on the pattern, parcel post or freight, whatever it is.

A. We prepay transportation on patterns shipped to the F. W. Woolworth stores.

Q. Is that true of Kresge, too?

A. Yes, sir.

Q. Does the Woolworth store in New Haven, Connecticut, sell Simplicity patterns?

A. I am pretty sure they do, sir.

Q. Are you willing to say they do, sir.

A. I am willing to say they do.

Q. As far as you know, there is only one Woolworth store in New Haven, Connecticut, isn't there?

A. I am pretty sure—Mr. Smith, I am willing to say so.

Q. But if there should be more than one, they all sell

Simplicity patterns? I am willing to say they all sell Simplicity patterns.

Q. Well, how about Kresge in New Haven?

A. The same applies.

Q. Mr. Shapiro, in response to the letter of March 9, 1955, from me to Mr. Simon, the Company's attorney, Mr. Simon has furnished certain information called for in that letter.

[fol. 213] I would like for you to identify and tell us how it was compiled—

Mr. Smith: —or may that be done by stipulation, Mr. Simon?

Mr. Simon: I would be glad to stipulate that if he were asked questions, he would say it was prepared from the books and records of the company; and if he were asked whether it is true and accurate, he would say yes.

Mr. Smith: Well, now, Mr. Simon, I hand you here three pages which I have marked for identification.

Will you mark these three pages for identification, please, your Honor, or have the Reporter do it?

Hearing Examiner Pack: Mr. Reporter, let these papers be marked Commission Exhibit 4-A, -B, -C for identification.

(The documents referred to were marked Commission's Exhibit 44-A, -B, -C for identification.)

Mr. Smith: Mr. Simon, I hand you here Commission Exhibit marked for identification 44-A, -B and -C.

Will you please state on the record that was submitted by you in response to the request contained in my letter to you of March 9, 1955?

A. I handed you that piece of paper, Mr. Smith, but I must say that the paper is meaningless, because it is the answers to the questions asked in your letter; without knowing what the questions were, the answers would not be very helpful.

Mr. Smith: I intend to put the letter in, but I just want to get a response to this question.

Mr. Simon: I handed you that piece of paper, yes.

Mr. Smith: Well, are you willing to state that responds, that this information submitted in response to that request contained in that letter?

Mr. Simon: I said a moment ago I was willing to stipulate, if he were asked, if you asked Mr. Shapiro the ques-

tions, he would give you the answers stated on that piece of paper.

[fol. 214] Mr. Smith: Your Honor, I thought maybe we could shorten this—

Mr. Simon: Well, I don't know how it could be any shorter than that, Mr. Smith. I am willing to stipulate that if you asked him questions, he would give you the answers on the piece of paper.

By Mr. Smith:

Q. Mr. Shapiro, I hand you here three papers marked Commission Exhibit for identification 44-A, -B, and -C.

Will you hold them in your hand, please?

A. (Witness complies)

Q. Mr. Shapiro, will you state the number of customers who purchased respondent's patterns in—well, that would be 1954, because this letter was written March 9, 1955—would that be correct, sir?

A. Mr. Smith, do you wish me to read these answers, these items in response to questions?

Q. I would like to know if these figures would be 1954.

A. I would presume they would be 1954, because this is an early 1955 letter.

Q. Would you say those figures—

A. Are approximately correct.

Q. Would you say they are 1954? I want to time them if I can.

A. I think I—yes, I would say. I don't really know, you see.

Mr. Smith: Mr. Simon, would you state what year these figures are for?

Mr. Simon: Those figures are as of March 31, 1955.

Mr. Smith: As of that date?

Mr. Simon: That is right.

The Witness: They couldn't be March 31; the letter is March 9.

Mr. Simon: The letter to us was March 9, but we took a little time compiling this.

The Witness: Oh.

Mr. Simon: And the figures that you have there are as of March 31, 1955.

[fol. 215] Mr. Smith: Is that for the fiscal year ending March 31, 1955?

Mr. Simon: That day; that exact day.

Mr. Smith: They are as of that particular date?

Mr. Simon: That is right.

Mr. Smith: All right.

Mr. Simon: I might add, Mr. Smith, that later you asked for specific figures for 1954 and in those cases we gave you what you asked for; but the first two questions, asking for the number of customers and number of outlets, the answers were as of March 31, 1955.

By Mr. Smith:

Q. All right, Mr. Shapiro, with that in mind, will you give the number of customers who purchased respondent's patterns?

A. We serve approximately 12,300 customers in continental United States.

Q. Will you state the number of retail outlets which sell respondent's patterns?

A. We serve approximately 17,200 outlets within the continental United States.

Mr. Smith: Now, Mr. Reporter, I would like for the record to show that Mr. Shapiro was reading from Commission Exhibit marked for identification 44-A, -B, and -C.

The Witness: I thought you requested me to read from it.

Mr. Smith: That is right, but I want the record to show that.

Mr. Simon: I am willing to stipulate that he will answer all the questions as shown on the exhibits here.

Mr. Smith: Yes, sir, it has been stipulated, as I understand it, that if Mr. Shapiro testified and were asked each and every question appearing on the letter of March 9, Commission Exhibit 45-A through -D, with the exception of questions 12 and 13, that he would answer as shown in Commission Exhibit 44-A to -C and Commission Exhibit 46-A to -H.

Mr. Simon: That is correct.

[fol. 216] Mr. Smith: It is as simple as that. Do you agree with that?

Mr. Simon: I certainly do.

Cross examination.

By Mr. Simon:

Q. Mr. Shapiro, the complaint in this case refers to chain stores, department stores and so-called small stores. Are the customers of Simplicity Pattern Company in each of those categories in the Washington metropolitan area shown on Exhibit 46-A to -H?

A. They are, sir.

Q. How many chain stores are there in the Washington area as shown by Exhibit 46?

A. There are—

Mr. Simon: Excuse me. For brevity, I would like the record to show that when I say Exhibit 46 I mean 46-A to -H.

Hearing Examiner Pack: That may be understood.

The Witness: There are 33 chain store outlets who represent three chains.

By Mr. Simon:

Q. And for this purpose, Mr. Shapiro, do we understand ourselves that by a chain store we mean the Red Front Variety Stores?

A. I do.

Q. How many department stores are there in the Washington area as shown by Exhibit 46?

A. Thirteen.

Q. And in reaching the number 13, have you included, for example, the three Hecht stores as three separate department stores?

A. Yes, sir.

Q. And what is the total number of companies in the Washington area owning department stores as shown by Exhibit 46?

A. Six.

Q. What is the number of small merchants in the Washington metropolitan area as shown by Exhibit 46?

A. Forty-eight.

Q. What is the total volume of business in the Washington area as shown by the exhibit?

A. Net pattern sales in this area for the year 1954 were \$84,681.

Q. What part of those sales were done by the department stores?

A. \$40,511 or 48 per cent of the total.

Q. What part of the sales were done by the chain stores?

A. \$16,805 or 21 percent of the total.

Q. What part of the sales were by the small stores?

A. \$27,365 or 31 percent of the total.

Q. How do those percentages for each of those three categories of customers in the Washington area compare with the percentages nationally for those groups of customers?

A. I have struck off a computation of the variety chain store group versus the total, and the national percentage was 24 percent, which is slightly higher than in the Washington area. I believe that allowing for that slight difference, the remainder of the Country would break up proportionately as shown by the Washington area, namely, that the department stores nationally would approximate 48 percent and the smaller independent stores would be 30-31 percent.

Q. The chain stores and the department stores in the Washington area comply 18 percent of your customers in the Washington area, is that correct, as shown by Exhibit 46?

A. I am sorry, Mr. Simon, I didn't get the question.

Q. Does Exhibit 46 show that the chain and department stores combined, constitute 18 percent of your customers in the Washington area?

A. Yes, sir.

Q. And, therefore, the small stores constitute 82 percent of your customers in the Washington area?

A. That is correct.

Q. And in the Washington area, do the 18 percent of your customers represented by the chain and department stores do 69 percent of your business?

A. That is correct.

Q. And is that comparable to your average nationally?

A. Approximately so.

Q. Would the national average be a little higher in view of the fact that the chains nationally do 24 percent [fol. 218] compared to 21 percent in Washington?

A. Within a percentage, one way or the other, I would say that that figure was correct—that percentage was correct.

Q. So that nationally 18 percent of your customers, being chain or department stores, do 70 percent of the business?

A. That is correct.

Q. And 82 percent of your customers, being so-called small stores, do only 30 percent of your business. Is that correct?

A. Yes, sir.

Q. How many customers are shown on Exhibit 46 as doing less than \$400 a year business with your company?

A. Of this group of stores, twenty stores, equal to approximately 20 percent of the outlets, did under \$400 per store with us in 1954.

Q. And what was the total volume of patterns shipped to those twenty stores in the year 1954?

A. We shipped these twenty stores \$10,600 worth of patterns.

Q. And how much were you required to give those twenty stores in the form of credits for patterns that were discarded or thrown away?

A. \$6,000 or 60 percent.

Q. And how much did those twenty stores pay you in cash for the \$10,600 worth of patterns shipped them?

A. \$4,500 net.

Q. Does that mean that for every \$100 worth of patterns shipped them, they paid only \$40 and \$60 in credits were issued for discarded patterns?

A. \$45.

Q. \$10,600 against \$4—

A. I have only in mind the gross figure and the discard figure and the net figure. I didn't compute it.

Q. What is the discard figure?

A. The discard figure was \$6,000 against a gross shipment of \$10,600 for a net of \$4,600, actually.

Q. What is the discard ratio?

A. 60 percent.

Q. And that means that they got discard credits for 60 percent of the total shipments?

A. That is right.

Q. And then, necessarily, they paid you in cash for only 40 percent of the total shipments?

A. Yes, sir.

[fol. 219] Q. And what percent of the business in the Washington area did those twenty customers do?

A. 5 percent of the business of the Washington area.

Q. You testified on direct examination that your company had roughly 16,000 outlets in the United States. Is that right? I believe your testimony was—Excuse me, 17,200.

A. 17,200.

Q. Of those 17,200 outlets, approximately how many of them comparable to the twenty stores in Washington you just testified about did a gross volume last year—a net volume last year of \$400 or less?

A. Not less than 6,000 stores—

By Mr. Simon:

Q. Mr. Shapiro, what were the total national sales in 1954? I believe you have it on the sheet of paper in front of you.

A. I am sorry, I can't locate my notes.

Q. Isn't that it? Just below the middle of the page: 1954 total national sales.

A. Oh, yes. The 1954 total national sales were \$16,450,000.

Q. And what were the national discards?

A. The total national discards were \$6,421,000.

Q. And what was the national average of discard in 1954?

A. The national average of discards for the year 1954 was 39 per cent.

Q. And that compared with 60 percent for the smaller stores in Washington?

A. Yes, sir.

Q. Did your company lose money on each one of the twenty stores in the Washington area that did less than \$400 of business in 1954?

Mr. Smith: I object to that—

The Witness: We did sir.

Mr. Smith: —unless he brings down his books and records and breakdowns to show what each store lost.

Mr. Simon: I will be glad to do that right now. Mr. Smith. I am prepared to

[fol. 220] Mr. Smith: I am not telling you to do it; I object to him testifying to it.

Hearing Examiner Pack: Your question, Mr. Simon, is whether or not the company lost money on the stores in the Washington area, each of the smaller or independent stores?

Mr. Simon: Each store that did \$400 or less in 1954.

Hearing Examiner Pack: That is confined to the Washington area, that is, the stores shown by this exhibit?

Mr. Simon: Yes.

Hearing Examiner Pack: The objection is overruled. You may answer, Mr. Shapiro.

The Witness: Yes, sir.

By Mr. Simon:

Q. Do you lose money on every customer who buys less than \$400 worth of patterns a year, net?

A. Yes, sir.

Q. Is the percentage of your business going to the Red Front Chains increasing or decreasing?

A. It has been decreasing.

Q. What was the percent of your volume sold to the Red Front Chains in 1951?

A. 32 percent.

Q. And what was the percentage sold to the Red Front Chains in 1954?

A. 24 percent.

Q. How long have you been with the Simplicity Pattern Company?

A. Since its inception in 1927-28.

Q. And your father preceded you as President of the Company?

A. Yes, sir.

Q. Are you personally familiar with the general operations of the stores in the Washington area selling Simplicity patterns?

A. Yes, sir.

Q. Will you very briefly describe the physical nature of

the operation of the department stores in the Washington area selling Simplicity patterns?

A. The pattern department is generally in or adjacent to a rather large textile section. The pattern department commonly takes a counter sometimes 20, 30, perhaps 40 [fol. 221] feet long. It generally has—and in all Washington instances has—chairs and other tables and chairs for the exhibition of counter catalogues, paraphernalia and other material. The cabinets housing the various pattern companies' stocks are in a row behind these various counters and on them are various form of displays, posters, placards, textile groupings and material of that kind. The floor which houses the variety of woolsens and linens and cottons and silks generally has models made up in the various pattern lines and other placards describing the material. That is the typical pattern department in the department stores in Washington.

Q. Do these department stores in Washington carry Simplicity patterns exclusively?

A. No.—

COLLOQUY BETWEEN EXAMINER AND COUNSEL

Mr. Smith: Your Honor, there isn't one line of evidence in this record about what department stores do. There is nothing whatsoever.

Mr. Simon: I must disagree, Judge. There is plenty. There is a line for every department store in the Washington area—one line for each of them.

Mr. Smith: Is there one thing in there on how they operate, who they sell to, who their competition is? Nothing.

Mr. Simon: Mr. Smith has put in the record—and I just take as an example here—Commission's Exhibit 46-E. He has a line here that—

Mr. Smith: That is a document that he furnished to me in response to a subpoena issued last March.

Mr. Simon: But he put in the record, Judge. And he put in the record a sheet of paper that shows that the Hecht Company at 7th and F Streets in Washington, D. C., sold this many patterns and got this many discards and this many returns and so on—all of the statistical figures about the Hecht Company. Those are just some bare bones, and I think I am entitled to put a little flesh on those bones and

show you how the Hecht Company sold it, and not merely that number.

Mr. Smith: I would like to be heard on that, Your Honor.

The only question in this case is that stated by the plead- [fol. 222] ings. There is evidence in this record about the competition, competitive injury between several small stores and the chain stores. There is absolutely not one line of evidence in here about any department stores other than this paper that he brings in here from his own books and records.

Mr. Simon: I object to that. I didn't bring it in, and I didn't ask for it. I was subpoenaed to bring it in, and I don't think he should say I brought it in.

Mr. Smith: Well, I certainly didn't go to New York and get it.

Mr. Simon: You sure did, you sent a subpoena for it.

Mr. Smith: There isn't a thing on earth in this record about anything that touches on this case about any department store. Now, he wants to try to sit down here and examine Mr. Shapiro and make out his own case, and I think he ought to do it on his own time.

Hearing Examiner Pack: May I see the exhibit and the place where you refer to the Hecht Company?

Mr. Simon: Yes, sir. There are three lines here for each of the three Hecht stores, Judge, and it gives all these figures for them, and there is a similar place in here for Woodward & Lothrop and for Kaun's and Lansburgh's and for every Washington department store. There are thirteen Washington department stores listed in that exhibit.

Hearing Examiner Pack: And what are you seeking to bring out now by the present question which is objected to?

Mr. Simon: This piece of paper shows that Hecht sold \$7,600 worth of patterns, and I am trying to show the physical circumstances under which Hecht sold those patterns.

Mr. Smith: What difference does it make? There is nothing in this record, Your Honor, regarding the method of sale or anything about Hecht, Woodward & Lothrop or any of them.

There were only four small-store witnesses brought in [fol. 223] here which has anything to do with this case. Of course, I could have taken that piece of paper and torn it up

and limited it to the four that I brought in. But the mere fact that there is certain statistical information on here regarding them, I don't think opens up a vast field of inquiry when there is absolutely nothing here regarding any department store.

Mr. Simon: Judge, there are two issues in this case. One is whether one group of stores is in competition with another group of stores; and secondly, if they are in competition with each other, whether there is anything unfair about the way the respondent company treated one group as against the other group. Mr. Smith has to pass both hurdles to get in his case.

Now, it seems to me one of the things you want to know when you decide whether there is anything unfair about the way one group was treated as against another group is more than the mere physical fact of dollars. You want to know something about the operation of each of them. Otherwise, I don't see how you can possibly determine where there is anything unfair.

Mr. Smith would like to try this case on the basis of putting in two pieces of paper and saying one is black and one is white and, therefore, something is unfair.

First, we are going to argue that there is no competition between them. But, if that doesn't prevail, then we are going to show you there is nothing unfair about the different treatment they got. And the only way that can be shown— And, bear in mind the obligation isn't on us to show there is something different about them, the obligation is on him to make out the case. And I think just to put those statistics in there and show how many patterns Hecht Company sold without showing the circumstances surrounding their operation is only telling a small, tiny part of the story.

Mr. Smith: Your Honor, the Hecht Company hasn't anything to do with this case. It is just like I say, the only [fol. 224] evidence in this record is regarding four Washington witnesses and one fellow and a couple of small merchants up in New York. There is no department store brought in this case; no evidence as to competition, whether any department store is in competition with anybody else.

Mr. Simon: I don't see how Mr. Smith can make that statement, Judge, in view of Exhibit 46.

Mr. Smith: I object to it on that ground. If he wants to

ask questions based on the record, why that is something else.

Hearing Examiner Pack: Mr. Smith, may I ask just what purpose, in your view, the information in this exhibit, Commission's Exhibit 46, serves insofar as it relates, for example, to the Hecht Company?

Mr. Smith: Nothing. It is just—— Last March when we wrote that letter, we wanted the information on the customers in the metropolitan D. C. area, and we brought four of them in here at this hearing we had in November to testify and representatives, I think, of four chain stores. That is all.

But; I can't tear the thing up: That is the way he sent it in. That is the way we called for it, and that is the way he sent it in.

Mr. Simon: That is the way we offered it.

Mr. Smith: What do you want me to do, take a pair of scissors and cut it apart?

But, there is nothing in here about the Hecht Company.

Hearing Examiner Pack: Do you think, Mr. Smith, that there can properly be received in evidence, either through an exhibit or otherwise, certain information regarding a purchaser, in this case, for example, the Hecht Company, showing a number of items here as to the, I take it, amount purchased and possibly the returns, or whatever the exhibit may show in detail in regard to the Hecht Company; and do you think, after receiving information of that kind in the record, the cross examiner can properly be foreclosed from [fol. 225] developing in further detail the circumstances in connection with that particular company?

Mr. Smith: Your Honor, those are statistical figures that he has there on the Hecht Company showing the amount of purchases and the amount of standing debit, if any; amount of cabinets. whether they are paid for or whether they are paying interest on them or not. What on earth has that got to do with all this examination. It is information taken from his own books. The information speaks for itself, it doesn't need any cross examination of it—assuming it is the truth, and I do assume it is true. It is nothing but statistical information.

Hearing Examiner Pack: It may be that in the final analysis the information here in the exhibit and the infor-

mation which Mr. Simon is now seeking to develop by Mr. Shapiro will be regarded as not material to the issues.

However, my difficulty is that the matter has been gone into with Mr. Shapiro on direct. And when I say gone into, I mean, not only specific questions put to him this morning or this afternoon on direct examination, but the information shown by the exhibit which has been received in evidence in connection with his testimony.

Mr. Smith: I didn't ask him anything about that exhibit except to explain the transportation charge, Your Honor. Here he wants to cross examine his own witness about his own information.

Mr. Simon: He is not my witness, and it is not my evidence.

Mr. Smith: He is your witness; he is an adverse witness. He is your witness.

Mr. Simon: You called him, Mr. Smith.

Mr. Smith: I don't care what you say about it.

Hearing Examiner Pack: Mr. Simon, you are seeking to develop now, as I understand it, in connection with the Hecht Company, just how the Hecht Company operates with respect to the sale of Simplicity patterns. Is that the subject of the inquiry?

[fol. 226] Mr. Simon: Except that I didn't mean to take that much time and go into that much detail. My question was directed to the Washington department stores in general. Rather than take each one up separately, I thought that would be quicker.

Hearing Examiner Pack: Well now, all of the Washington department stores which you would intend to include in your question are referred to and included in this exhibit; is that correct?

Mr. Simon: Yes, sir.

Hearing Examiner Pack: This exhibit includes all of the stores in the Washington metropolitan area with which Simplicity does business; is that correct?

Mr. Simon: Everyone, sir, and the subpoena called for every customer in the Washington metropolitan area.

Hearing Examiner Pack: I think, gentlemen, Respondents, in the circumstances, cannot be precluded from the present inquiry; so the objection is overruled.

Do you know what the question is, Mr. Shapiro?

The Witness: I don't know at what state of the question we are, Judge.

Hearing Examiner Pack: Suppose you re-ask it, Mr. Simon.

Mr. Simon: I believe he had asked the question before the objection.

Hearing Examiner Pack: Miss Reporter, can you find he last question and answer, please?

(The reporter read the last question and answer.)

Hearing Examiner Pack: It appears that the last question asked by Mr. Simon, and which brought about the present discussion, was whether or not the Washington department stores, that is to say, the department stores in the Washington metropolitan area, and referred to on Commission's Exhibit 46, handled Simplicity patterns exclusively. Mr. Shapiro's answer was "no."

At that time Mr. Smith made his objection, and I take it that actually Mr. Smith's point is that the answer [fol. 227] should be excluded. As I have indicated previously, I think the inquiry is not improper. The objection is overruled, and considering Mr. Smith's objection as a motion to exclude that answer, that motion will be denied, and the answer may remain.

Go ahead, Mr. Simon.

By Mr. Simon:

Q. Mr. Shapiro, how many other lines of patterns do these Washington department stores carry?

A. They carry all the other lines with rare exception.

Q. And what are the other line?

A. The other lines are Vogue, McCall, Butterick and Advance.

Q. Will you explain to us briefly the physical nature of the operation of the small stores in the Washington area?

A. The small stores in the Washington area mirror the large stores, I might say, in miniature. The area is not as large; the counters are not as large. There wouldn't be as many chairs or other material in the department, but in principal the layouts of the floors and methods of selling, the clerks behind the counters in the department store, they are, of course, permanent clerks, serving pattern

customers. In the smaller store the girl may sell yard goods or other material at the same time, but in principal the departments are similar.

Q. Now, will you explain the physical nature of the operation of the Red Front chains in the Washington area?

A. In the Red Front chains, the syndicate variety store, the patterns are under the counter. They are in drawers, and the only material visible to the customer is a counter catalog, or two or three, if it is a large store, on top of some counter, or on what we call Bible stands, which are screwed on to a counter and contain a counter catalog.

In small sign holders, of about 8 by 6 inches, there is often a sign or description regarding Simplicity patterns. There is no other material; there are no yard goods. It is generally on an end counter somewhere in the store. The [fol. 228] only other place, any other part of the store plays in the display of patterns, is in the frequent window displays that the variety stores use on patterns.

Q. Approximately how much space does a chain give to patterns; that is, space which the customer has access to?

A. I couldn't estimate the amount of space, because it is largely that of a counter catalog or two, lying most times on top of other merchandise on the counter, or the amount of space that these Bible racks, Bible stands, take.

Q. Are you talking about one square foot or less on the average?

A. I am talking about inches.

Q. How many lines of patterns do the small stores in the Washington area generally carry?

A. Fifty per cent of the stores that Simplicity sells to have Simplicity patterns alone. The other 50 per cent of the stores have one or two competitors, competitive pattern lines in the store.

Q. Do any of the chain stores in the Washington area, that you sell, carry any other pattern lines?

A. They do not.

Q. Charging the pattern department of these department stores with a fair charge for rent for the space operated, and salaries for girls and other overhead items, is it possible for any department store to sell patterns at a profit, even though the pattern companies gave them the patterns for nothing.

A. In my thirty years in this business, I have never known a department store to show a profit on a pattern department.

Q. And with a fair charge for overhead, would that be true even if they got the patterns for nothing?

A. I don't know just how much—

Mr. Smith: I object. He is testifying up here that Woodward and Lothrop, Hecht's, Kann's, make no money on patterns. I say that is objectionable. Unless he can bring the books of Woodward and Lothrop and Hecht's down here, that answer ought to be stricken.

Mr. Simon: He is giving his opinion based on thirty years' experience in the business.

[fol. 229] The Witness: More than that.

Mr. Smith: He can't state, unless he states the basis of this opinion, and that he went up there and audited the books of the department stores in this town and segregated the pattern business, otherwise I object to it.

Hearing Examiner Pack: The precise question is whether or not in Mr. Shapiro's opinion the department store can show a profit on patterns, even if they got the patterns for nothing. It seems to me to be so highly speculative as to be improper. The objection is sustained to that question.

However, Mr. Smith, I think that in so far as Mr. Shapiro's testimony is concerned; that is, stating that to his knowledge no department store so far as he knows, or that he has any knowledge of, has shown a profit on patterns, it seems to me that testimony should remain. I think it is a matter of—about which Mr. Shapiro, in view of his experience, his long experience in the business, might be permitted to express an opinion.

Mr. Smith: If Your Honor please, I don't want to object after you have ruled, but unless he can state what his knowledge is, unless he can state he has gone over the books of any one department store in this place, and has some knowledge based on an audit of their books or an examination of their books, I submit that this is an improper answer, an improper question and an improper answer.

Hearing Examiner Pack: It occurs to me that some of those matters, at least you referred to, Mr. Smith, might

be proper subject for cross-examination. I am not undertaking to appraise the value of the testimony at this time, but simply to rule that I think Mr. Shapiro, in view of his experience in the industry, may be permitted to express an opinion on the subject. I believe there is no matter pending on which a ruling has not been made. You may go ahead, Mr. Simon.

[fol. 230] By Mr. Simon.

Q. Do you know of any department store that carries patterns for the purpose of making a profit?

A. None.

Mr. Smith: If Your Honor please, that is an improper question. We are going to run this examination from now on to forever if he is going to just stand there and ask question like that, unless Your Honor stops me from objection.

Mr. Simon: Judge, I am amused at the difference in rules of evidence that apply to the different litigants. I remember Mr. Smith asking a question, What was your impression as to what the man meant when he told you so and so. Mr. Smith insisted that he had a right to ask that. That goes further than anything I have ever heard before.

Mr. Smith: That is all right. There I tried to get the impression that this man received from what was said.

Mr. Simon: Here I ask a president of a company whether he ever heard in thirty years of experience of a department store making a profit. This isn't speculation. I am asking him what he knows.

Mr. Smith: I don't know. That is a funny question to me.

Hearing Examiner Pack: The objection will be overruled. You may answer, Mr. Shapiro.

The Witness: I know of none.

By Mr. Simon:

Q. Is the testimony that you have given here today with respect to the Washington department stores representative of the department stores throughout the country?

A. They are, sir.

Q. In miniature, as you used the phrase earlier, is your

testimony with respect to Washington department stores equally applicable to the Washington small stores?

A. Yes.

[fol. 231] Q. And is that equally applicable to small stores generally throughout the United States?

A. Yes, sir.

Q. Now, I refer you to Exhibit 46, and ask you to tell me what was the volume, the net volume of business done in 1954 by the Homestitch Shop, owned by Mr. J. W. Wall. It appears on page 12.

A. \$1422.

Q. And what was the net volume of business of the Woolworth store located next door to him in the same year? It appears on page 8, next to the last line.

A. That is 28th and Arlington Store?

Q. Yes.

A. \$527.

Q. You mean that Mr. Wall did almost three times as much business in Simplicity patterns alone, as the Woolworth store next to him?

A. Yes, sir.

Q. What was the volume of business done in 1954 by Mr. Merber's Yardstick Shop?

Mr. Smith: I object to that question. It appears on the exhibit. You are wasting time asking him what the exhibit shows.

Hearing Examiner Pack: That is true. It does appear on the exhibit. But it may be helpful to have the statement and the testimony, as well.

By Mr. Simon:

Q. It is on page 7, Mr. Shapiro, in the middle of the page.

A. Is that the Yardstick?

Q. Yes.

A. \$359.

Q. And two blocks away is a Woolworth store at 406 Seventh. What was its volume in 1954?

A. \$313.

Q. Situated in between Mr. Woolworth and Mr. Merber is the Hecht Store at F and Seventh, and how much did it do—

Mr. Smith: Now, wait a minute. I object to counsel testifying as to where the Hecht Store is located, whether it is between or not. He can give the address; but I object to his saying where it is.

Mr. Simon: I withdraw the question.

[fol. 232] By Mr. Simon:

Q. Mr. Shapiro, Mr. Merber testified that the Woolworth Store was two blocks south of him, and the Hecht Store was half a block south of him.

A. I believe he did.

Q. What was the volume of the Hecht Store, located in between the two stores?

A. \$7692.

Q. Does that mean that the Hecht Company in that one store did approximately ten times as much as Woolworth and Merber put together?

A. Yes, sir.

Q. What was the volume done in 1954 by Mr. Fliss' Mel-Ron Shop? It is on the last page, third from the bottom, the very last page under West Hyattsville, the third from the bottom on my sheet.

A. I can't make this out. Oh, here it is. I have it.

Q. What was his volume, Mr. Shapiro?

A. \$1,183.

Q. And what was the volume of the Kresge Company, three-quarters of a mile away, in Mount Rainier; page 5, just below the middle of the page?

A. \$521.

Q. So Mr. Fliss did more than double the business of the Kresge store three-quarters of a mile away?

A. Yes, sir.

Q. Now, you were asked by Mr. Smith to estimate the total number of patterns sold in the United States in 1954. On what did you base that estimate?

A. I based that estimate on published reports by other pattern companies, such as those as are publicly-owned companies, our own salesmen's reports, field reports, and by general knowledge of the pattern business in total.

Q. Did you consider in making this statement of the total pattern sales in the United States your information

as to Simplicity pattern sales and other company pattern sales in department stores?

A. I don't understand the question.

Q. In making your estimate of the total pattern sales, did you consider the volume of your own company's sales as well as the volume of your competitors' sales in the department stores?

A. Yes.

Q. And do you obtain information from your sales force as to these department store sales?

A. Yes.

[fol. 233] Q. Is that the place where all the lines sit side by side?

A. Yes.

Q. Approximately what percentage of the department store pattern sales go to your company?

A. Our average receipt from the stores who sell all pattern brands is approximately 40 per cent in units.

Q. Does that mean that you get 40 per cent of the business in department stores, and the other four pattern companies share the other 60 per cent?

A. On the average.

Q. Are your company's sales first in the department stores?

A. In most places.

Q. And in all those places do your pattern books sit side by side with the pattern books of the other four companies?

A. They do.

Q. Is there any reason for your sales being ahead of the others, other than the women picking your patterns more often than any other?

A. I think there is.

In the first place, Simplicity is the most popularly priced pattern of any of the patterns in the field.

Q. By "popularly priced," you mean the lowest price?

A. The lowest price. We prefer to use "popularly priced," but lowest is, of course, what it means. We have traditionally been that since the inception of our business.

In the second place, Simplicity patterns were the second patterns to become printed patterns in the field. McCall preceded us, and we incorporated the printed pattern with

our low price to give superior value twenty years ago. 1935 is what I am talking about. So we have built over this twenty-year period, with the combination of low price and the printed pattern feature, a solid—we hope a solid—Simplicity audience.

And, in the third place,—and that which is hardest to do, to define, of course, is a matter of taste, which is designing—

Q. Styles?

A. Styles. The public likes our interpretation of the fashions and modes, obviously, because all the rest wouldn't [fol. 234] matter if they didn't, and I would consider those three the foundation of our sales success.

Q. In these department stores where you and your competitors' books sit side by side, do the department stores give your books any preferential treatment?

A. None whatsoever.

Q. Do you have any patents on the making of the patterns?

A. No, sir.

Q. Do you have any patents on the machinery on which the patterns are cut or printed?

A. None.

Q. Do you have any patents or any other monopoly on the paper on which the patterns are made?

A. No, sir.

Q. Do you have any patents or monopolies on the styles for patterns?

A. No, sir.

Q. In making this estimate of total sales, have you considered the sale of Butterick patterns as increasing or decreasing?

A. Increasing.

Q. Are they increasing as fast as the pattern industry generally, or faster than the pattern industry generally?

A. They are increasing faster than the pattern industry in general.

Q. On what do you base that statement?

A. Their own published report.

Q. And to what effect is that?

Mr. Smith, Your Honor, certainly I didn't go into anything like that on direct examination.

Mr. Simon: He opened this one wide. He asked this man for his opinion of the total pattern sales of the industry in 1939, in 1951, and in 1954, and the man gave his opinion; now I am asking him what he based that opinion on.

Mr. Smith: Is that a statistic that you are going to read as to what Butterick sales was?

Mr. Simon: Yes.

The Witness: I don't know whether the Judge has stated that I could answer or not.

Mr. Smith: I understood the question to mean as to [fol. 235] whether or not Butterick is increasing or decreasing, and why they are increasing.

Mr. Simon: I didn't ask why they were increasing. I asked only whether they were increasing faster than the market, and he said yes.

Mr. Smith: The only thing I asked him about was statistics. If he wants to read some statistics, O. K., but if he is going to read some president's report about a prognosis of the future on Butterick, I don't think I went into anything like that.

Mr. Simon: It is not prognostics for the future, it is statistics of the past.

Hearing Examiner Pack: As I understand, Mr. Smith doesn't object to the actual figures.

All right.

The Witness: The Butterick report—and I quote—states that in 1941, 45,000,000 patterns were sold, and that in 1955, 90,000,000 patterns were sold, indicating a growth of 100 per cent for the pattern industry.

Mr. Smith: Are you speaking of Butterick having sold that many, or the whole industry?

The Witness: May I just finish this?

Mr. Simon: The statement was the whole industry. Now he will tell you what Butterick sold.

The Witness: Butterick goes on, and I quote:

"In 1941 their pattern sales were 4,000,000, and in 1955 their patterns sales were 12,000,000 units, an increase of 200 per cent, versus the industry increase of 100 per cent in the same period of time."

By Mr. Simon:

Q. In making this estimate, did you consider whether McCall's sales were increasing and, if so, more or less than the industry?

A. McCall's sales for the same period are increasing, as by their published statements. I do not believe that they are increasing at a faster rate than the industry, but increasing nevertheless.

[fol. 236] Q. Do you know whether the McCall sales are increasing in spite of fewer customers?

A. They are increasing despite fewer customers; again, their own printed statements.

Q. What is the statement as to that effect?

A. I have here their annual report for both the years 1953 and for the year 1954, the last issue. I am reading first from the statement of 1953:

"With the exception of 1951, department store piece goods sales have shown a decline in every year since 1948. This continued decline in piece goods sales, changes in our delivery schedules and elimination of shipments to unprofitable accounts adversely affected pattern sales during the first six months of the year; however, a substantial improvement in pattern sales was made in the second half of the year, with the result that the net sales of patterns and fashion publications ended ahead for the year 1952."

In their statement of 1954, and I now quote:

"During the latter part of 1954 department store sales of piece goods showed an improvement for the first time in several years, an improvement which was reflected in increased reorder sales of our dress patterns."

Q. Did you say there that they had fewer customers?

A. I stated that from their previous report.

Q. I am not sure I heard you. What did it say in the previous report about fewer customers?

A. In the previous report:

"This continued decline in piece goods sales, changes in our delivery schedules and elimination of shipments to unprofitable accounts,—"

Q. Thank you very much.

A. In the 1950 report I note another paragraph which I have marked, and I now quote:

[fol. 237] "Increasing wage, material and distribution costs have had an adverse effect upon the profits of the Pattern Division, but a change in this trend should result from the installation of new cost-savings equipment, changes in our price structure, the broadening of our market for our products, and through the elimination of marginal distribution outlets."

Q. You testified earlier that your company had 6,000 accounts selling \$400 a year or less, and they were unprofitable. Have you eliminated any of them?

A. We have not eliminated any if them. We have never eliminated a customer who has paid his bills, whether he has been profitable or unprofitable, in the years I have been president of the company.

Q. If they are unprofitable, why do you keep them?

A. We started our business in 1928 through the small and smaller dealers in the United States. As a matter of fact, our principal sales distribution was effected through the wholesale jobbers of the country. We were not well known and were not widely distributed through the large department stores in urban centers. However, the small store found our patterns, set-up, terms, arrangements satisfactory, and we have maintained that attitude toward the small store from the first day we started our business.

And despite the fact that in the 1930s there was considerable shakeout of such dealers because the depression years hurt them more than it did other forms of distribution, wherever it was possible to reinstitute that type of distribution, we have done so.

In the last five years we have averaged 1200 new accounts in this category a year.

Q. In general, do those people come to you and ask for your patterns, or do you go to them and try to sell them?

A. They almost invariably ask us for our patterns. We have some 17,000 outlets in this country. We have ten sales representatives. It is obvious to see, since we sell our [fol. 238] patterns not only in urban centers and neighbor-

hood stores, but in the smallest towns and hamlets of the country, that it would be impossible to find these merchants, solicit them, if we were not inquired of by them.

Q. You have testified that your company sells patterns equal to 47 per cent of the total patterns in the country. Is that in units or dollars?

A. Units.

Q. What per cent of the dollar sales do you enjoy?

A. I would estimate that our dollar sales are about 33 $\frac{1}{3}$ per cent, because, being the lowest priced of the pattern lines, as contrasted with the highest price, Vogue, there is a big disparity between units and dollar sales in our industry.

Q. You have also testified that certain red-front chains have a standing debit from your company. In your opinion, does that standing debit impede access to those stores by your competitors, or make access to those chain stores by your competitors easier?

A. It makes the prospect of selling these chain stores easier for our competitors.

Q. Why?

A. The fact that a company—and I will use the largest of the companies as the example, F. W. Woolworth—would have a million or a million and a quarter dollars invested in merchandise such as ours, which has very small, if any, reclamation value in the event of our bankruptcy or their desire to cancel or terminate—

Hearing Examiner Pack: We will take a five-minute recess.

(Recess taken.)

By Mr. Simon:

Q. Mr. Shapiro, I believe I omitted to ask you whether Advance Pattern Company's sales are increasing or decreasing.

A. They are increasing.

Q. Do all of your competitors now have printed patterns?

A. They do.

Q. Does that include the newspapers?

A. They have just arranged for printing equipment, and they will shortly start printing their patterns.

[fol. 239] Q. And when did Advance start printing?

A. In 1955.

Q. When did Vogue start printing?

A. They have already started to print. Their first delivery of the printed pattern will be in February, next month.

Q. You have been doing it for twenty years?

A. Yes, sir.

Q. When did Butterick start?

A. About five or six years ago.

Q. You have testified that the department stores and the small stores are charged for transportation, catalogs, cabinets? What would it cost your company, as indicated by Exhibit 46 for the Washington stores expanded to the entire country to not charge your customers for transportation, cabinets or catalogs.

Mr. Smith: I object to the question because he is going into costs, and I haven't gone into that on direct examination.

Mr. Simon: On direct examination Mr. Smith asked Mr. Shapiro if it wasn't true that one group paid for these things, and the other group didn't pay for it. Now I am asking what is the amount of money involved on what he brought up on direct examination.

Hearing Examiner Pack: Is this question answerable by reference to the exhibit, Mr. Simon?

Mr. Simon: It would be answerable by reference to the exhibit by a matter of computation, Judge. The exhibit says that the average transportation is \$60 a store, and there are 12,000 or 15,000, 14,000 non-chain stores; so if you multiply 14,000 by 60, you would get the transportation.

The cabinets are shown for the Washington stores, and if you multiply that, you would get the cabinets. All of that is a matter of computation and could be arrived at from the exhibits.

Hearing Examiner Pack: At least you are expecting Mr. Shapiro to base his answer on the exhibit, Commission's Exhibit 46?

Mr. Simon: Yes, sir.

[fol. 240] Mr. Smith: Does he have a right to put in his defense here in cross-examination of this witness? That is the question I am asking.

Mr. Simon: I have a right to go into everything that Mr. Smith went into on direct examination.

Mr. Smith: I don't think that he has a right to put in his defense by examination of this witness, which is his own witness; and the only thing that I have asked is to identify those documents that Mr. Simon brought in, or the papers, whatever you want to call them.

Hearing Examiner Pack: I believe, Mr. Smith, you did ask Mr. Shapiro about the cost of the transportation, did you not? Did you not bring out that it was \$60 per year?

Mr. Smith: That was what he was called on to produce in our letter of March 9, information as to costs, and he didn't do it. He just brought in an average. He didn't figure the costs. We asked him to bring in the costs of transportation in the metropolitan stores, and he merely brought in an average.

Hearing Examiner Pack: I believe you did ask Mr. Shapiro about that average; is that correct?

Mr. Smith: I asked him to identify it, because, as it is, it is unintelligible. It appears up here.

Hearing Examiner Pack: You are referring there to Commission's Exhibit 46-A, are you not?

Mr. Smith: 46-A. When I read that thing, I didn't know what it meant. I asked him to interpret it.

Hearing Examiner Pack: And he did, as I recall.

Mr. Smith: Yes, sir.

Hearing Examiner Pack: And stated or explained what the average transportation cost was?

Mr. Smith: Appearing on this exhibit here.

Hearing Examiner Pack: Now, Mr. Simon, what is your question?

Mr. Simon: My question is: What is the amount of money it would cost the company, or conversely, that the buyer pays for transportation, cabinets and catalogs per year, of those who now pay it?

[fol. 241] Hearing Examiner Pack: The answer to be based upon the figures given in Commission's Exhibit 46?

Mr. Simon: Yes, sir.

Hearing Examiner Pack: The objection is overruled. You may answer, Mr. Shapiro.

The Witness: In excess of \$2 million a year.

By Mr. Simon:

Q. On the same basis, Mr. Shapiro, what would it cost your company to give standing debits to all customers who do not now have a standard debit?

A. In excess of \$10 million.

Q. What is the net worth of your company?

A. I will refer to our 1954 annual statement. The net worth of the Simplicity Pattern Company, at year end 1954, is \$5,436,000.

Q. So it would cost double the total assets of your company to give everybody a standing debit?

A. That is correct.

Q. Have you ever made as much as \$2 million a year, even before taxes?

A. No.

Q. You have testified here about discards, Mr. Shapiro. Will you explain what discards are, how they come about, and their relationship to orders?

A. Yes, sir. The merchant has a stock of patterns, and a counter-catalog, which illustrates all the designs in his line. The size of his stock, small, large, or medium, doesn't matter. Every month new designs are issued, approximately 40, and those 40 designs are in approximately six sizes for each design. And across-the-board selection is sent to him, depending upon the size of his stock, so he has representation in his inventory of everything the counter catalog shows. This is done each month, constantly newly created material is manufactured, designed and manufactured, and shipped to him, and then every four months a discard list is sent to him in which we request the withdrawal from the line of a certain amount and an equal amount of the new designs that we had shipped in the previous three or four months.

[fol. 242] Therefore, three times a year the dealer's stock is brought back to his contract parity, his even level, exactly where he started from, but the effect on his inventory is that on an average of every 18 months his entire line turns over, with a completely new selection of designs; and this goes on ad infinitum. While this is occurring, the merchant is presumably ordering at the end of each day those patterns which he has sold during the day; sends the orders to our nearest warehouse, and they come back into stock.

The health, or wealth of our business depends on the ratio of the patterns he actually sells against that quantity which is indicated by our monthly orders, which necessitate his selection, turn-over. Our national average over the past ten years has approximated 35 per cent.

Q. Is what you are saying, Mr. Shapiro, that your profit depends on the number of patterns the customer pays for in proportion to how many he throws away that you have to give him credit for?

A. Exactly, sir.

Our general budgets and forecasts are presumed to indicate a sale of two patterns for each pattern that we receive back. If we sell two patterns, and receive two patterns back, obviously that is what has the greatest effect on our profit. If we have less return, our profit would, of course, increase. In our published annual statement that figure is clearly shown for the year 1954, our total gross sales and sundry income, not to infer that this is all patterns, was \$21,612,000, and we had to provide for discards, returns and allowances, \$7,995,000.

Q. If your discard ratio went up 10 or 12 per cent, would it wipe out all your profits?

Mr. Smith: If Your Honor please, is this proper on cross-examination?

The Witness: It would.

Hearing Examiner Pack: It seems to me this is getting outside the scope of the examination.

[fol. 243] By Mr. Simon:

Q. How do the chain store averages on discards compare with your national average?

A. They mirror the national average accurately—

Mr. Smith: Your Honor, please, I didn't go into anything like that.

Mr. Simon: You certainly did. Exhibit 64 shows the discards of each chain, and I am asking him how those discards compare with the national average.

Hearing Examiner Pack: You may answer, Mr. Shapiro.

The Witness: They reflect the national average, give or take one percentage point, in either direction.

By Mr. Simon:

Q. How do the department store discards compare with the national average?

A. They are very much better than the national average for us.

Q. How do the small stores compare with the national average in discards?

A. The small stores generally start at 38 and 39 per cent, and are much worse than the national average.

Q. And as a whole are they worse than the national average?

A. Yes, they are.

Q. Did you personally participate in the original negotiations with the Woolworth Company and these other Red Front chains that resulted in your entering into contracts to sell them patterns?

A. I did, sir.

Q. On what bases were they willing to buy your patterns—

A. When we presented—

By Mr. Simon:

Q. Mr. Shapiro, does Exhibit 46 show that your company sells to the Red Fronts including Woolworth on different terms than you sell to the Department stores and the small stores?

A. Yes, sir.

[fol. 244] What is the reason for doing so? Or what are the reasons?

A. I believe certainly in my business lifetime, the syndicate references stores did not carry patterns and I had never heard that they had anybody's. When we started this business in 1927 and 1928, as I already said our first sales efforts were in the field to the smaller dealers. We were virtually unknown in the big markets and in the big stores. We conceived the idea that the paper pattern while largely a product and a combination of service was still a product, small wares product which a Five and Ten Cent store could sell. They seemed to us to be singularly designed and equipped to sell Five and Ten Cent store

items. I solicited these chains for a number of years and the first chain that put in Simplicity patterns was S. A. Kress & Company. They knew no more about patterns than I had actual experience with the Red Front store. They outlined to me the differences time and time again between their operation and a department and dry-goods store and finally they consented to a test. Among the reasons that were put forth, with that their total inventories contained in a counter, that island as they called them oftentimes was not much more than we required them to put in in pattern inventory.

To make matters worse patterns turn over, give a store an average turnover of about one and a half times a year. The average Five and Ten Cent store turnover is seven times a year. Therefore we put the patterns in on standing debit. In one instance we covered the amount of the inventory by buying the corporation's stock which they held as collateral. As Simplicity Patterns proved successful in their stores and volume increased, and prices increased, naturally the total inventories increased in net value.

Sometimes they got beyond what our original standing debits were and as went along we brought them up to a form of parity. Today these syndicate stores are largely on standing debit and have been so in practice or in principle from their inception.

[fol. 245] Q. Could you have sold those syndicate stores on the same terms you charge the department and small stores?

A. No, I could not have and I don't think that—I think that we would be discriminating against them if we did.

Q. Why?

Mr. Smith: I move to strike that, your Honor. I keep objecting, it seems, but it seems to me that this examination has gone far afield. This witness says he would be discriminating if he did. He has evidently been highly coached as to what he is to testify.

Mr. Simon: I object to that, Mr. Smith.

Mr. Smith: He is a layman and knows all about discriminating and somebody has been telling him something, and I move to strike that testimony.

Hearing Examiner Pack: Of course, gentlemen, so far as the use of the term discrimination is concerned, if that was used in anything like a legal sense, I think it would be objectionable. I have understood that this was simply further development of the theme Mr. Simon wanted to pursue with respect to showing what the differences between the contracts were with the Variety store on the one hand and the so-called independent store on the other. If that is still the purpose of the inquiry, I think as I indicated before, that it is not improper.

Mr. Smith: How long will it last?

Mr. Simon: We would be through by now, Mr. Smith.

Mr. Smith: I have a right to object unless you want me to leave the courtroom.

Mr. Simon: No.

Hearing Examiner Pack: I believe you had asked Mr. Shapiro whether or not in his opinion he would be able to sell the Variety stores on the same terms as the other stores. Is that the question, Mr. Simon?

Mr. Simon: Yes. I believe he answered that he could not.

[fol. 246] By Mr. Simon:

Q. Is that right?

A. Yes.

Mr. Simon: I am ready to ask another question if I may.

Hearing Examiner Pack: Go ahead.

By Mr. Simon:

Q. Did you try to sell the Variety stores on the terms that you were charging the other customers?

A. No, we did not try to sell them on the terms and while I don't want to use words that are unsatisfactory to the court, I mean them in the dictionary sense, not the legal sense, I must come back to the words of discrimination. Here is what I mean by it.

Mr. Smith: I don't want him to go into that discrimination any further. I object to it.

The Witness: I don't mean it in a legal sense. I don't know what word to use.

By Mr. Simon:

Q. We are on another question. When you tried to sell these chains your patterns did you ever ask them to pay the same price that other people were paying?

A. The chains at one time were paying a lower price than they are now. As prices went up in our nation in the past 15 years or another, prices were raised to the chains as well. I think I mentioned that earlier this morning. At that time and we are now speaking almost more than 25 years ago I don't remember the amount of discussion and bargaining that went on to establish the basis of the deal.

I have outlined some of the points in them but I referred to changing the terms that we basically entered into them over the starting years and I would say no and I would like to explain why.

Q. Very well.

A. As I said earlier we started our distribution in the small stores. As a matter of fact in the early 1930s we had [fol. 247] thousands and thousands of them. We were still unknown in the metropolitan centers and in the big stores, although we had some. The Woolworth stores throughout the country and the Kress stores in the south and the Kresge stores in the Middle West by putting Simplicity patterns in their windows and on their counters and on their ledgers served to popularize and propagandize this unknown brand and product so that traffic surrounding these stores and the nearly adjacent large department stores created a situation where we became better known and faster known than we could possibly have been under any other circumstances.

It served as a sampling process, then, which it serves now and we began to develop our distribution through the most worthwhile channels of distribution, which are the large department store after that time, not prior to it. And therefore we have always realized, you see, that the selling forces that the Woolworth and Kresge and Kress and stores of that kind put forth for us have been extremely valuable.

Q. Did these stores ever tell you whether they would handle your patterns if they could not make a profit on their sale?

A. The Woolworth store, for example?

Q. Yes.

A. Yes. Then subsequently and particularly at the period when we could increase our prices to them by 6 per cent, we of course have grumbles with them as any supplier would have with a merchant who raises prices and since that time we have discussed terms periodically.

I certainly would like to get the very most money for our goods we can from any customer of that size certainly.

Q. Have you ever discussed with Woolworth the terms they have to get in order to make a profit on the sale of your patterns?

A. Yes, we have discussed it many times.

Q. Have they shown you the figures to show that they could not make a profit at any higher terms?

A. Yes. They have proved to me, certainly to my satisfaction that with the large amount of inventory, under [fol. 248] counter space it takes and the slow turn over against their total store turn over, that we about scrape through for minimum profit earnings for them.

Q. Do your small independent stores get any benefit from the fact that Woolworth sells patterns?

Mr. Smith: I object to that as calling for a conclusion and speculation.

The Witness: Well, I know—

Hearing Examiner Pack: Mr. Simon, I am afraid I don't see how that is within the scope of the direct.

By Mr. Simon:

Q. Does the Woolworth Company get the same goods and services from you that the small merchants get?

A. The Woolworth Company gets less.

Q. You mean for the money they pay you they get less goods and services than the small merchants?

A. With the exception of the discussion on the literal terms they get less.

Q. Mr. Smith asked you this morning some questions about a magazine that you sent out.

Mr. Simon: May I have a word off the record?

Hearing Examiner Pack: Yes. Off the record, Mr. Reporter.

(Discussion off the record.)

By Mr. Simon:

Q. Mr. Shapiro, I show you a document that has been marked Respondent's Exhibit 11 for identification and ask you if that is one of the magazines that you talked about on direct examination.

Mr. Smith: It is.

By Mr. Simon:

Q. Does the Woolworth Company make any use whatever of that magazine?

A. None whatever.

Q. Do the small merchants make any use of that magazine? [fol. 249] zine?

A. Extensive use of the magazine and the program behind it.

Q. What use did the small merchants make of that magazine last year?

Mr. Smith: Your Honor, I never asked him anything about that magazine except only to show the question of interstate commerce, whether or not they were shipped in interstate commerce.

Mr. Simon: There are two reason for asking this question. One is that Mr. Smith did ask about the magazine and I am going into the same magazine. But secondly the retail merchants get that included in their price of the patterns. Every one of these Washington merchants whom Exhibit 46 shows paid the Simplicity Company various amounts, got many services and I am trying to show what it is that these small Washington merchants get for the money shown on this exhibit.

Mr. Smith: I did not go into that. I asked him whether or not that stuff was transported in interstate commerce.

Mr. Simon: Mr. Smith has put into evidence that the Arlington Remnant Shop taking the first company on Exhibit 46 paid the company \$223.04 last year and I am trying to show what they got for their money. Mr. Smith

claims that they were treated differently than the Woolworth and I am about to show that if anybody was short-changed it is the Woolworth Company.

Mr. Smith: I did not say they were treated differently. I said they were treated differently only in certain respects as shown there and the respects are shown there and not generalized.

Mr. Simon: I am being specific now as to the facts that the small merchants are preferred over Woolworth and any discrimination is against Woolworth and not against the small stores by showing what the small fellow got for his money.

If Mr. Smith can show that the man paid us some money, we certainly have a right to show what we gave him for his money.

[fol. 250] Mr. Smith: I thought that showed that.

Mr. Simon: It does not.

Mr. Smith: Maybe you didn't give me all the right information.

Mr. Simon: I did. You didn't ask for all the information.

Mr. Smith: Certainly he does not have the right to go beyond that photostat.

Mr. Simon: I am trying to show what the small merchants got for the money that document shows he paid us.

Mr. Smith: You are limited to the direct examination and you can't go beyond this photostat here.

Hearing Examiner Pack: Am I correct in my understanding where this Commission Exhibit 46 shows a payment by a particular store or shop that you are now seeking to develop that one of the things the store received for that payment was this.

Mr. Simon: This service.

Hearing Examiner Pack: This service here.

Mr. Simon: Yes, sir.

Hearing Examiner Pack: The service represented by the respondent exhibit 11.

Mr. Simon: Yes, sir.

Hearing Examiner Pack: Along with that, Mr. Simon, do you intend to show that the ten cents or variety stores do not get this service, that is to say they do not get this publication?

Mr. Simon: They do not utilize it, yes, sir.

Hearing Examiner Pack: Mr. Smith, you were about to say something.

Mr. Smith: These prices on this exhibit here, as I understand them, 46-A through H, show what these merchants paid for patterns pursuant to the terms of a written contract.

Mr. Simon: It does not show all they got for their money.

Mr. Smith: Is there anything in the contract showing that they got anything else.

[fol. 251] Mr. Simon: Yes.

Mr. Smith: Where?

Mr. Simon: Right in the back of the contract.

Mr. Smith: That they didn't pay for?

Mr. Simon: There are a lot of things in there.

Mr. Smith: Show me.

Mr. Simon: Every one of the contracts that you put in evidence talks about the Simplicity Pattern Book and you have not put one word in about the Simplicity Pattern Book which is in every contract.

Mr. Smith: All right, let's find it.

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By Mr. Simon:

Q. Mr. Shapiro, does the fact that the Woolworth stores and other syndicate stores have their inventories on standing debit facilitate access to the stores by your competitors or does it restrain access to those outlets by your competitors?

Mr. Smith: I object to the question because I don't know what "facilities" and "restrains" in that connection mean.

Mr. Simon: Judge, this question was asked once and he got halfway through his answer, without objection.

Mr. Smith: Well, you are asking again and I am objecting to it. I don't know what the question means.

Mr. Simon: I am not asking him a new question, I am asking him merely to complete his answer which he only halfway answered yesterday.

Mr. Smith: Well, I object to it because I don't know what the question means. It is vague and indefinite.

Mr. Simon: I don't understand, Judge, that the rules requires me to ask questions that Mr. Smith understands, if the witness understands.

Hearing Examiner Pack: Mr. Reporter, will you read Mr. Simon's question?

(The question was read.)

[fol. 252] Hearing Examiner Pack: Objection over-ruled. You may answer, Mr. Shapiro.

The Witness: It gives pattern manufacturers, competitors of ours, a greater opportunity, a better opportunity to sell the F. W. Woolworth Company, for example, typifying the syndicate chains.

By Mr. Simon:

Q. Why.

A. Because the inventory in the F. W. Woolworth Company stores, for example, is somewhere between \$1,000,000 and \$1,250,000. That is a rather large inventory, even for the F. W. Woolworth Company.

These patterns, in the event of bankruptcy by the Simplicity Pattern Company or if the F. W. Woolworth Company should wish to cancel for one reason or another, or terminate business relations with us for one reason or another, have very little value, certainly not in those great quantities—they obsolesce quickly because of season and change so that the burden on the F. W. Woolworth Company would be very much greater, their involvement and interest in the Simplicity Pattern Company would be so great that the—well, the pattern department might wag their policy.

As it is presently constituted, whatever happens to the Simplicity Company or whatever decisions are made by the Woolworth Company for the future continuance—continuance or not of the Simplicity Pattern Company, places no great burden on either one of us.

Consequently, they can act in their best interests at any time and I would presume that if a better pattern or perhaps even better terms were offered to them by someone else, they could move much more easily in that direction.

I don't believe that would be true if they had this large investment in an item such as ours.

Proportionately, that would, of course, pertain to the other syndicates that have been under discussion.

Mr. Simon: Now, Judge, on page 795 of the record, we have had a good bit of discussion about my right to ask Mr. Shapiro the reasons for the difference in terms charged [fol. 253] the Woolworth Company and other syndicate stores from the terms charged the department stores and the small stores shown on Exhibit 46.

On page 795, you over-ruled Mr. Smith's objection to that question and said that Mr. Shapiro could answer and he started to answer the question and about a page later we got into an argument about something else and that question is not answered.

I would like to go back and ask him for his answer to the question which is on page 795, which you had sustained, mainly, the reasons for the difference in terms charged the Woolworth Company and the syndicates from the department and small stores shown on Exhibit 46.

Hearing Examiner Pack: Very well.

By Mr. Simon:

Q. Mr. Shapiro, what is the reason or what are the reasons for the different terms charged Woolworth and the other syndicate stores that we talked about here, from the terms charged the department stores and the small stores as shown on Commission Exhibit 46?

Mr. Smith: Your Honor, I would like to renew my objection to that question.

There is nothing under Section 2 (e) of the Robinson-Patman Law that says anything about any reason or that gives any reason as a justification to violate that section.

Mr. Simon: Are you dismissing Count 1, Mr. Smith?

Mr. Smith: No, I am not dismissing it, but at least I want to limit the testimony as near as I can.

The Judge has ruled that it is relevant—not relevant, but that the question may be answered.

We have two counts here and I would like to know what count it is being admitted under, whether it is under both counts or Count 1 or Count 2 or what.

Hearing Examiner Pack: It would be my thought, gentlemen, offhand, that this testimony would relate primarily, if not exclusively, to the charges under Count 1 of the complaint.

[fol. 254] However, I do not wish to make that as a ruling at this time. That, it seems to me, is one of the things that is going to have to be considered by the Examiner in his final consideration and decision of the case.

It seems to me that if it is proper to receive the answer at all, and the Examiner has held that it is, it seems to me that we should go ahead and receive the answer and then discuss later if counsel desire, whether it has any bearing on both counts of the complaint or whether it is restricted or should be restricted to one of them.

As I say, it seems to me now that probably, or should relate to Count 1 of the complaint, but I shall have to determine that later on.

Mr. Simon: May he answer it?

Hearing Examiner Pack: He may answer.

By Mr. Simon:

Q. Do you have the question in mind?

A. Yes, sir.

There are four basic reasons why there is a differential in terms between the variety syndicates and the other types of merchants.

The first one is that it is a totally different type of business, they conduct a different type of business.

Second, the general overhead applicable to the maintenance and servicing of their accounts versus the independent merchants.

Third, the amount of money in marketing and promotional and educational activities devoted to the department, dry goods, and smaller dealers, which is not applicable to the "red front" syndicate stores.

Fourth, the discard ratio of the chains as a whole versus that of the independent merchants is the single most important fact constituting whether we have a profit or loss.

We do, and over a period of years have had a historical application of what that discard ratio would be.

Mr. Smith: If your Honor please—Are you through?

The Witness: Yes.

[fol. 255] Mr. Smith: The only thing that is set up in this answer, and I read it again this morning, is under Count 2—your Honor, I move to strike that answer and any similar testimony in the record like it, for the reason that the

only affirmative defense which I have been able to find, and if I have overlooked it I would like counsel to call it to my attention, is in the respondent's answer to Count 2, in which he sets up what appears to me to be concerned with differences in cost and in which it is alleged:

"Respondent shows that there are differences in its costs, to different customers because of differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which its products are sold to its customers.

"Respondent denies that the value of any service or facility furnished to any one customer or group of customers and not furnished to other customers exceeds the difference in the costs of manufacture, sale, or delivery resulting from the differing methods or quantities in which such products are sold, distributed or delivered to such respective customers."

Now, there is no evidence here that this witness has offered of any cost figures, no cost studies or no cost data showing or tending to show what this witness purportedly testified to, and in the absence of it I move to strike his testimony and if there is any other defense set up in here at all, I would like counsel to point it out, anywhere.

Hearing Examiner Pack: What about the answer as it relates to count one of the complaint?

Mr. Smith: I don't see anything regarding cost justification in count one. If there is, I would like counsel to show me where it is.

Hearing Examiner Pack: No. What I had in mind was as to the defenses set up as against count one of the complaint.

[fol. 256] You are referring to the affirmative defense set up in the answer to count two. My impression is that this testimony related primarily to count one of the complaint, or at least it was not restricted to count two.

Mr. Smith: Well, I have been unable to find any cost justification or anything like that in count one, and if there is any, I would like counsel to show me where it is.

Hearing Examiner Pack: Well, doesn't the answer in replying to count one, set up or allege that there are some

reasons for the differences between the ~~prices~~ charged the two—

Mr. Simon: Yes, sir.

Hearing Examiner Pack: —groups of stores?

Mr. Smith: I don't see any, Your Honor—would counsel point them out to me?

Mr. Simon: Judge, paragraph nine, in one of the sentences in paragraph nine of our answer, one of the sentences in that paragraph which related solely to count one of the complaint is as follows:

“Respondent denies that any of its commercial practices are unfair methods of competition and denies that any of its practices are discriminatory”——

Mr. Smith: What are you reading from?

Mr. Simon: Paragraph nine of the answer.

“Respondent denies that any of its commercial practices are unfair methods of competition and denies that any of its practices are discriminatory in favor of large customers as against smaller customers.”

I am sure that Mr. Smith knows that cost justification has nothing to do with Section 5 of the Federal Trade Commission Act. This is a Robinson-Patman case, frankly, I mean it is the type of case that Congress intended to be under Section 2 of the Robinson-Patman Act—and I will [fol. 257] argue that at the proper time—but Mr. Smith, for reasons of his own, wants it to be brought under Section 5 of the Federal Trade Commission Act.

The only issue is whether there were unfair methods of competition, whether there was discrimination in favor of one group as against another, and I do not believe that discrimination is used in the Robinson-Patman Act in the sense of being unfair to one group as against another group, and this question relates precisely to that part of the answer, when we say we deny that what we do discriminates or is an unfair method of competition.

Hearing Examiner Pack: The motion to strike will be denied.

However, Mr. Smith, I will be glad to give you at the proper time the opportunity to argue on the legal aspects you have mentioned, particularly with respect to whether

this testimony constitutes a defense to either charge in the complaint.

My thought is that I can hardly undertake to pass upon so serious a question as that during the course of the present hearing.

Mr. Smith: Well, it is certainly not my intention to have you, to urge Your Honor.

The only thing is, I do not want to waive it. And when you say, "at the proper time," I presume that means later on, after the testimony's conclusion?

Hearing Examiner Pack: At the time you gentlemen submit your proposed findings and conclusions or argue the matter before the Examiner.

Mr. Smith: Yes, sir.

Hearing Examiner Pack: That, generally, is what I had in mind, in other words, when we get to the point where we are arguing and considering all of the issues in the case.

Mr. Smith: Yes, thank you.

Mr. Simon: May I proceed?

Hearing Examiner Pack: Yes.

[fol. 258] By Mr. Simon:

Q. Of the four reasons, Mr. Shapiro, which you just gave, the first one being the different character of their operations and the fourth reason being discards, you had previously discussed them on yesterday, is that right?

A. I believe so, sir.

Q. The second reason you gave was a difference in overhead costs of doing the business between the two groups.

A. Yes, sir.

Q. Would you explain briefly what the difference is?

A. Again using the Woolworth Company as an example, because they are the largest of the variety syndicate store group, the amount of personnel, clerks and executives or junior executive time taken towards their account is almost negligible.

We have one person and two clerks handling the correspondence of the entire syndicate business that we have.

This applies as well in the warehousing or the factories of any place else that we have contact with them.

On the other hand, the small merchant is in constant correspondence with us—reconciling our accounts, handling

the two way shipments, both of patterns going and returns coming—the average letter involves small, extremely small, sums of money—this is a penny business, the reorders are on the average of \$2 per package received, multiplying them into the thousands, in the handling of a package, whether it is somewhat larger or smaller is the same, as far as cost factors are concerned, and therefore, approximately 80 per cent of all our personnel is devoted to the attention of these small dealers.

Of the remaining 20 per cent, 15 per cent of our attention is devoted to the department stores and the small five per cent, in relation to the rest, is about our manpower applied internally toward the handling of this business.

In the field, where we have representatives and where we have women working in the field, the cost in application to the independent merchants is total, because we are not permitted to enter their stores for the purpose of selling, for the purpose of promoting, not even in terms of social contact with the individual store manager—

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By Mr. Simon:

Q. Let me ask you another question and pick up from there.

You gave some percentages of time spent by your personnel in different categories of customers.

A. Yes, sir.

Q. Are those your best estimate of time spent in those categories?

A. It is my best estimate of the time spent in those categories, and I did not cover, as I recollect, the matters of credit and—you know, other matters of like character which, of course, make the small dealer or small merchant business more costly to handle.

Q. How many sales representatives do you have calling on these department stores and small stores?

A. We have ten sales representatives, and we have approximately twenty to twenty-four women.

Q. Do they, any of them, call on the syndicate stores?

A. None.

Q. What is the average cost per year to your company of the salaries and expense accounts of each of these sales representatives?

A. \$20,000.

Q. And of the women—

A. Each.

Q. And of the women?

A. Approximately \$10,000 each.

Q. Would you explain in just as few words as you can, the difference in the credit problems in the small stores and the chain stores?

A. Well, the chain stores pay their bills, of course, promptly, every ten days.

Their own accounting organizations are geared to process business promptly and normally and consequently, both in the flow of the payments of money to us and in the reconciliation of accounts, which goes on weekly and monthly, the problems are absolutely minimum.

That does not obtain as far as the small store is concerned because he does not have the means at his disposal [fol. 260] to maintain records as accurately, nor does he process them as promptly. Quite the contrary.

I believe that our total F. W. Woolworth Company correspondence files in the course of a year would not be any larger than the total number of a half dozen small—which is indicative of how much of a paper relationship we have with them.

Then, of course, there is no credit risk in these syndicate accounts. We do have considerable on the small store.

Q. Now, Mr. Shapiro, the last reason you gave for the differences was promotion.

Will you tell us briefly what are the promotional expenses your company incurs for the small stores and department stores?

A. Well, we, of course, do general promotional work that is of benefit to all of our customers and to the Simplicity Pattern Company in general, but we do undertake, we have specific promotions which are designed for the department store, for the small dry goods and small general store, and which are not either available or usable by the syndicate variety stores.

The first program that comes to mind is our school program. We spend in the school field for educational—educational work, approximately \$500,000 a year, in addition to publishing a home economics magazine which goes to the 40,000 some odd home economic teachers throughout the country who teach sewing and cooking and other crafts of that kind.

We back it up with a force of young ladies, a dozen in number, who travel through all of these schools, giving fashion shows in these schools, and they become acquainted with the teachers and learn about the needs and projects in the schools—how many students, when their sewing projects are, and what material to create for them.

This information is documented and is delivered personally by them or by our sales representative to the departments and to the small independent store in a city or a town. We do not differentiate between them.

[fol. 261] The use put to this material is up to the merchant or small storekeeper himself. As the problems are greater with the large department store, it is generally, mostly the small merchant who is able to call on the school, use swatch books that we provide him so that he can mount little pieces of his fabric and prices and find out what kind of fabric is being used, and generally make contact with them, which he does.

In addition to that being a market by itself, it is of course a means by which he builds a continuing relationship with his customers for the future.

On the other hand, none of this is done by a Woolworth store or a Woolworth manager. He is not permitted to go out of his store to seek business. Pattern sales made in the stores must be made as an impulse item, and there is no machinery either at the executive office level or at the store level that would make the use of this material interesting or possible.

The next item is posters. We create each month on an average of five to six posters, 14 inches by 22 inches in size and larger.

These posters portray fabrics or trends or things of mutual interest to the Simplicity Pattern Company and to the department store and small merchant.

They are sent out each month at no cost. The total amount spent in the year 1955 on that item was approximately \$200,000.

None of these are used by the F. W. Woolworth Company, for example of the syndicate variety group as a whole. They are not permitted to.

They are not permitted to use displays and material made by individual manufacturers, of whom many supply F. W. Woolworth stores, and consequently this poster program does not apply to the syndicate stores.

We have and we send out periodically, from six times to as many as ten times a year, various flyers and some of them are quite elaborate, of which I have samples here.

[fol. 262] These tell the small merchant—and they are designed, entirely, for the small merchants—what the proper sources of supply are in New York, what the trends are, how to trim his windows, how to run certain aspects of his department and a great deal of other material.

We are aware of the fact that the small merchant does not have this means at his disposal or this knowledge at his disposal, so we condense it into brochures and it is indeed a valuable service for him.

We publish another magazine called the "Simplicity Pattern Book," of which in addition to the 530,000 copies that are sold in department, dry goods and news stands, trade editions are also made.

We swatch them and list information about the sources of supply of textiles and notions and accessories and so forth, all of which is a help in the buying of this merchant.

Our magazine was the first to go into four-color and to use textiles dramatization, garment dramatization, and it is far from being a catalog of our pattern designs.

We lose a considerable sum of money on this publication—I should not say "lose," it costs us, because it is a calculated action on our part, in order to glamorize and dramatize for the consumer and for the merchant the textiles and trends throughout the country.

Here again, not selling fabrics, not being in the fabric business, the syndicate variety stores are not interested in this item.

We have others, but I think perhaps, Judge, that would suffice for illustration at this time.

Q. Would you care to comment on the 4-H program, Mr. Shapiro?

A. The 4-H Program is an extension of all our educational activities.

In addition to having some merchants in cities or in suburban areas of cities, of course, a great many of our small merchants are in rural areas and hamlets.

The 4-H Program is largely devoted to rural—children who live in rural areas and the information of our programs and projects through the 4-H organization is distributed to [fol. 263] the small merchants in the small hamlets rather than the other type of small merchants.

Q. And is that program promoting home sewing among the girls in the 4-H Clubs?

A. It is.

Q. Mr. Shapiro, in your opinion, would the F. W. Woolworth Company continue to buy your patterns if they were charged the same terms as small stores?

A. I know they would not.

Mr. Smith: I object to that; speculative.

Hearing Examiner Pack: Objection overruled. I think Mr. Shapiro may be permitted to express his opinion on the point.

I think the question was answered.

(The answer was read.)

By Mr. Simon:

Q. Why?

A. I lost a part—I don't know which, whether I answered that or not.

Q. You answered that you know they would not. Why?

A. Because the pattern is a small ware item in their store, like all of the small ware items that they carry.

I have had many conversations with them over a period of twenty years about pricing. They have outlined to me and proved to my entire satisfaction what the marketing problems are of their organization and the cost application to the selling of merchandise and, in particular, ours.

I am certain that the F. W. Woolworth Company, again as an example of the syndicate group, makes the minimum

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amount of operating profit on the type merchandise we sell them, due to the amount of space, the amount of inventory, and the slow turnover of the commodity.

I should like to mention that the fact that the patterns are on standing debit in the Woolworth stores does not take away from the fact that is charged to the store operation or a department operation in the total department or in the individual store. It must account for these patterns in some accredited accounting manner.

[fol. 264] So, taking those factors into consideration, I know that they will not pay us the terms that we extend to the small merchants.

Q. In your opinion, would the Woolworth Company carry your patterns if they could not make the profit on them?

A. Would they carry a pattern if what, sir?

Q. If they could not make a profit on them.

A. I know they would not. They carry no item that is not for the purpose of profit. They carry no loss leaders, as they are commonly known in the trade.

Q. In your opinion, if you had to raise your price to them, would some competitor replace you in the Woolworth stores?

A. Presuming that—

Mr. Smith: I object to the question. There is nothing here to show any basis for such a question and I object.

Hearing Examiner Pack: Again, it is a matter of opinion. I think Mr. Shapiro, with his experience in the industry, may be permitted to express an opinion on this subject.

The Witness: Would you repeat the question, please.

By Mr. Simon:

Q. In your opinion, if you had to raise your price with your Woolworth stores, the same as you charge the smaller stores, would you lose that business to a competitor?

A. Well, presuming that the competitor charged less than we, it would be possible.

I don't know how any—I don't know what a competitor would do.

I do know this, that if the Woolworth Company, and I have been told so, has to pay more than the current terms

that they are paying us, the likelihood is they will not carry patterns at all.

Q. Does any competitor of yours have a lower price to small stores than your price to small stores?

A. No.

[fol. 265] Redirect examination.

By Mr. Smith:

Q. Mr. Shapiro, I understood from your testimony in response to questions of Mr. Simon that department stores and smaller independent stores do not make any profit on the sale of Simplicity Patterns.

Was that your testimony?

A. They do not make a profit on the sale of any patterns.

Q. On any patterns?

A. On their pattern departments in total.

Q. That includes Simplicity Patterns?

A. That includes Simplicity Patterns.

Q. That includes large department stores like Hechts, Woodward and Lothrop—

A. Yes, sir.

Q. —here in Washington?

A. Yes, sir.

Q. How do you know the Hecht Company does not make any profit on the sale of patterns?

A. I know that the Hecht Company, as typifying the department stores at large, doesn't. Because, in the first place, I have discussed this matter with at least—

Q. Let's not go into any discussion—

Mr. Simon: Let him answer the question. He asks how does he know something and—

Mr. Smith: I do not want hearsay, and I object to it if he is going into what somebody told him.

Mr. Simon: Judge, this is fantastic.

Mr. Smith: It is not fantastic.

Mr. Simon: Let me say my piece, Mr. Smith.

Mr. Smith says, "How do you know that the Hecht Company is losing money," and Mr. Shapiro is about to tell

him—and for all I know, he may end up saying, “Mr. Hecht told me so,” but Mr. Smith says, “I do not want any hearsay.”

Of course, I have never known that hearsay was not admissible, but he particularly asked him why.

Mr. Smith: How does he know of his own knowledge? That is what I am trying to get at.

[fol. 266] Mr. Simon: He is about to tell you of his own knowledge what he knows, what he saw—what the man knows.

Mr. Smith: I object to what anybody told him, and I withdraw the question.

Hearing Examiner Pack: Very well, the question is withdrawn.

By Mr. Smith:

Q. Did you ever see an audit of the Hecht Company's books breaking down the sale of patterns?

A. I have seen audits of department store departments at large, including patterns.

Q. Did you ever see an audit of the Hecht Company store?

A. I have already said the Hecht Company is an example of department stores.

The National Retail Dry Goods Association, which is the confederation of department stores, publishes figures.

Not individually of the Hecht store, no, sir.

Q. I am asking you if you saw an audit. Do you have any audits of any department stores with you—

A. Not individual department stores—

Q. —showing the loss on the sale of patterns?

A. Not in an individual department store, sir, but the NRDGA has the total figures of all department—

Q. I am—

Mr. Simon: Judge, I think he ought to let him finish the answer.

Mr. Smith: I think his answer ought to be responsive.

Hearing Examiner Pack: I believe Mr. Smith's specific question was whether or not Mr. Shapiro has with him any audits of particular department stores, and his statement is that he does not.

If there is anything further, Mr. Simon, you might take it up on further cross examination.

Go ahead, Mr. Smith.

By Mr. Smith:

Q. Have you ever seen any audits of any stores that you have with you showing the profit and loss on the sale of [fol. 267] patterns?

A. Mr. Smith, I do not quite understand. Do I have audits with me?

Q. That is right.

A. I have no audits with me.

Q. Now, you are a businessman, you have auditors to audit the affairs of the Simplicity Pattern Company, don't you?

A. Yes, sir.

Q. You do that because that is the only way to ascertain whether or not you are making money or losing money, isn't it?

A. Yes, sir.

Q. And that is the customary standard of business practice, to employ accountants or have their own accountants audit their books to determine what they are doing, isn't it?

A. That is right, sir.

Q. And unless you have an audit, you do not know, do you?

A. Well, I do not really understand that last question, Mr. Smith, because I do not have audits with me, but the material submitted in conventions and after the NRGDA and other channels of that kind, I would certainly presume, are the result of individual department store audits in the exchange of information.

Q. I do not want to be cantankerous with you, Mr. Shapiro, but I would like you to confine your answers to my questions.

I did not ask you anything about NRDGA, I do not even know what it is.

A. National Retail Dry Goods Association.

Q. I was just asking you simply if it is not a practice to have the affairs of a business organization audited in order to determine what its profit and loss standing is.

A. Yes, sir.

Q. And that is the only way that you can determine, as a businessman, whether or not a loss or a profit has been sustained, isn't it?

A. Yes, sir, I believe that to be so.

Q. Then, if you haven't got an audit, you do not know, do you?

A. I do not know what you mean. I do not have an audit here. Those audits do exist somewhere, and it is from these audits I am quoting.

[fol. 268] **Q.** And if you haven't got the audit you can't tell, can you?

A. Without an audit you cannot tell.

Q. But in your opinion, I believe you stated, if I recall your testimony right, in response to the questions of Mr. Simon, the department stores and smaller independent stores do not make a profit on the sale of patterns. Is that right?

A. That is right, sir.

Q. Then does anybody make a profit on the sale of patterns?

A. I believe that F. W. Woolworth makes a profit on the sale of patterns, yes, sir.

Q. What about Kresge?

A. I believe that includes Kresge.

Q. What about other similar chains?

A. I believe it applies to all that fit in this category of discussion.

Q. They make a profit?

A. I believe they do.

Q. Then the chain syndicates are the only ones who make a profit on patterns?

A. I believe that to be true.

Q. Now, all chain stores, including Woolworth, Kresge and the rest of them, carry what is generally known as "sewing notions," don't they?

A. Yes, sir.

Q. Do they have any connection with the sale of patterns, or do patterns have any connection with the sale of sewing notions?

A. Not any more than a toothbrush would have with tooth paste bought on sale. They are both items that serve perhaps a similar consumer.

Q. Isn't it true, when a woman comes in a ten cent store and buys a pattern and a zipper to fit into the pattern, that the pattern tells her what kind of zipper to put in it?

A. It tells the length of the zipper, yes. Not the kind of zipper, the length of zipper.

Q. Aren't the sewing notions in syndicate stores placed on the shelves right next to where the patterns are for sale?

A. Yes.

Q. Why do they do that, just for nothing?

A. Because they are related items tending to serve the consumer at the same time. They wouldn't put them with hardware, that is not logical.

[fol: 269] Q. Isn't it because they both go together?

A. They go together as much as any other items go together, yes, sir.

Q. Just as much as patterns and dress goods, don't they?

A. The customer needs textiles, and she does need notions and findings to complete her garment.

Q. Don't they all go together?

A. They do.

Q. One as much as the other?

A. Well, I could not venture their relative importance, but they do go together.

Q. Now, I hand you here Respondent's Exhibit 11, called "Modern Miss." That is what you gave us this morning?

A. Yes, sir.

Q. Right?

A. Yes, sir.

Q. This is a publication that Simplicity sends to home economic teachers throughout the land, is that right?

A. Yes, sir.

Q. How often do you send them?

A. Four times a year.

Q. Do the operators of stores of any kind get them, too?

A. They sometimes get them as examples, but mostly they are shown copies by our representatives as a matter of interest and background so that he would know how to tie in with our program.

He does not get them for his own use.

Q. They are not sent to him?

A. Directly?

Q. Directly—Simplicity?

A. No, sir.

Q. If he sees one, it will be because some Simplicity salesman comes around and sells it to him?

A. Or because he has seen it in a school.

Q. In a school?

A. Yes, sir.

Q. He has got to get out and attend a school in order to see it? Is that right?

A. Well, he doesn't attend a school——

Q. Or work in a school?

A. He probably goes there to find out what business he can build up or be of some service to the school.

Q. Do the department stores engage in this, too, or just the little fellow?

A. The department stores engage in it, too, but they do [fol. 270] not engage in it to the extent the little fellow, as you call them, does, because there are too many schools in a city for them to be as effective as the small man who is concerned with only the schools around his vicinity with whom it is easy for him to have an acquaintanceship.

Q. You count on the small merchant to do that because he is the only one that will do it, don't you?

A. We don't count on him to do it at all. We are not in the textile business. He does it because we supply them to counter-balance—swatch books and things that he can mount fabrics, and his prices and his designs—and have something concrete to offer the school.

It is for his benefit, not ours. We do not care——

Q. You send this to the home economics school teachers throughout the country for the benefit of the small merchant, is that right?

A. We send it for the benefit of Simplicity and all of its merchants who are in the textile or home-sewing field. I merely said, I believe, that the small merchant benefits most, and that the syndicate store as epitomized by the F. W. Woolworth Company benefits, not at all, or at the most very little.

Q. All right, how do you account for this advertisement appearing here in the Respondent's Exhibit 11? There isn't a page number, but it is an ad of a Perfectform Bra.

A. Yes.

Q. It says on there:

"Go to Woolworth, Kresge or other leading variety store today after school and see what Perfectform offers you at 69 cents and \$1."

Do you think that he is a small merchant?

A. I am not in the bra business, and as long as his advertising is not misleading or unethical, we have no control over that, Mr. Smith.

Q. Now, in this Respondent's Exhibit 11 there are a number of ads, starting off here is E & W Quadriga cloth. Do they pay for that ad?

A. They do.

[fol. 271] Q. Over here is LaMode buttons. Do they pay for that, the La Mode people?

A. They do. All advertisers in the publication pay for their ads.

Q. Do the ten-cent stores sell buttons—Woolworth?

A. They do not sell necessarily those buttons advertised. I would not know, sir, but they do sell some buttons.

Q. Also, you have in this Respondent's Exhibit 11 various fashions set out, have you not?

A. Yes, sir.

Q. And underneath them you have the appropriate number of the Simplicity Pattern?

A. Yes, sir.

Q. Stating the number?

A. Yes, sir.

Q. Therefore you are doing your own advertising, aren't you?

A. Everything that we do, primarily, is our own advertising to begin with. But it is funneled to do certain specific jobs within the general framework, allowing that it is in our primary interest.

I do not contend otherwise.

Q. Well, I got the impression you were contending, by putting Respondent's Exhibit 11 in evidence, that this was something you were doing for the love of the small merchant.

A. I do not think love is inappropriately placed there, Mr. Smith. I can say this to you: That the small merchant is

the primary beneficiary of this particular program, and that is what I contend.

Q. Well, let's try to get it down to what it is. I just want the record to show just what this exhibit contains.

Mr. Smith: I would like for Your Honor to examine it at the proper time, if you will. It will appear that it is primarily an advertisement of various styles and Simplicity Patterns and Dresses containing advertisements of various natures, including sewing notions as well as dress goods, the sewing notions being sold by the chain syndicate stores as well as their competing small independent stores, and even with the suggestion on at least one of the advertisements—to which attention was called—suggesting [fol. 272] going to a Woolworth, Kresge or other leading variety store.

Mr. Simon: Is that a final argument, Mr. Smith, or a question to the witness?

Hearing Examiner Pack: Let's go ahead with the examination.

By Mr. Smith:

Q. Now, how do you arrive at the cost of these advertisements of advertisers as compared with what this magazine costs Simplicity? What do you figure that the advertisers pay for most of it or half of it or what?

A. Would you like me to give you the cost factors on this publication?

Q. If you have them.

A. Yes, I do have them.

Q. All right, go right ahead.

A. This publication without any attendant program in 1954 cost \$130,000. That is what our net loss on the publication was.

Part of your question was: How do you arrive at the rate of advertising? I must say, first, why we carry advertising.

The rate of advertising that we charge does not pay for the physical paper and printing of the space it occupies.

The reason we do it is because, largely, and almost totally, the advertisers in that magazine have developed educational programs of their own and have available for the

teachers charts and brochures and publications, all of which are teacher aids in the teaching of their students.

We have developed that over a good many years, and we feel that by creating a publication which gives the home economics teacher more general knowledge about everything that interests her in addition to home sewing, that we are being of value to the home economists, to the school program and it is a part of our efforts in which we try to coordinate the activities of textile companies, notions companies, accessory companies, et cetera, et cetera, into one package.

It is a fairly altruistic form of approach which I think has paid Simplicity to the extent of good will which it has [fol. 273] gotten over a period of twenty years that it has been in existence.

Q. The fact remains, Mr. Shapiro, that this Modern Miss, Respondent's Exhibit 11, is sent to the home economics teachers throughout the country?

A. Yes, sir.

Q. And it contains advertising and illustrations of Simplicity Patterns; right?

A. Yes.

Q. Therefore, there is advertising by Simplicity Pattern Company. Is that right?

A. Yes.

Q. Do most manufacturers charge their advertising costs as loss—as you have referred to this \$104,000 loss—or do they refer to it as advertising expenses? Now, which is right, Mr. Shapiro?

A. I originally said cost, and then I said cost meaning, of course, loss on an auditing basis. We do not consider it a loss as though we were running magazine properties without any idea of what the costs were, because our attitude toward them is not that of a commercial property which is presumed to stand on its own feet.

Yes, that is a sales promotion, education is sales promotion. And I accept your term of cost to us in terms of our advertising budget, rather than a loss as a magazine operation. I accept your statement, sir.

Q. It is advertising by Simplicity Pattern Company?

A. It is advertising, sales promotion and education, all

of which constitute those under a general title, I believe, of marketing.

Q. All right, sir.

What I am trying to get at is what do you give. Mr. Simon, as I understand it, at least he gave me the impression, that there is something you give the small merchants, something that they get that you give them in addition to the patterns.

Now, we have gone into this Modern Miss; what else have you got?

A. Well, the biggest thing—

Mr. Simon: I hope you will let him finish the answer to [fol. 274] that question now, Mr. Smith, because that is a good question.

Mr. Smith: May I ask without your comment? I would like—

Hearing Examiner Pack: Let's go right ahead with the examination. I believe Mr. Smith has asked a question. Now we will take Mr. Shapiro's answer.

The Witness: May I ask that it now be repeated?

Hearing Examiner Pack: Yes, sir. Will you read the question back, Miss Reporter?

(The question was read by the reporter.)

The Witness: The biggest, single thing that we have to give the smaller merchants is our attitude—

By Mr. Smith:

Q. Your attitude?

A. I said the single, biggest—

Q. Did I understand you to say attitude, sir?

A. Yes.

Q. Well, I am speaking of material things, material things in the way—

A. I would like—

Q. —of something along the line of—

A. I would like to develop this, sir.

Q. I do not think that is responsive. I am not asking the witness—

Mr. Simon: He asked him what they gave them, and he is now about to tell what he gave them. I was afraid he would not give him a chance to answer the question.

Mr. Smith: I won't if he wants to go into attitude. I am thinking of something material, something he buys and pays for similar to this magazine or any other article of value that you give them.

Hearing Examiner Pack: I take it, then, your question now Mr. Smith, is what is supplied by the Simplicity Company to the small dealer in the way of something tangible or material?

Mr. Smith: That is right.

Hearing Examiner Pack: That is to say, in the way of [fol. 275] promotional or advertising material. Is that what you had in mind?

Mr. Smith: Something they give them of a material value. A pattern is a material thing. It is a commodity.

Mr. Simon: We deny that.

Mr. Smith: Well, let him deny it.

Hearing Examiner Pack: Very well. At any rate, you are now asking Mr. Shapiro whether in addition to the pattern itself, there is anything further of a tangible or material nature supplied to the small dealer?

Mr. Smith: Yes, sir.

Hearing Examiner Pack: You may answer, Mr. Shapiro.

The Witness: It seems to me, Mr. Smith, that if we sell and service, regardless of profit or loss, and take every merchant on our books that has any reason for selling patterns or wanting Simplicity patterns, and have never discarded a customer or canceled on them whether he is sold—

Mr. Smith: I object, your Honor, because the answer is not responsive.

Hearing Examiner Pack: Gentlemen, I think we just cannot get anywhere unless, when a question is asked, and if the answer seems to be reasonably related to the question, we go ahead and take the answer. I think that is the situation here. It seems to me Mr. Shapiro is undertaking to answer the question as best he can, and I think we should receive his answer. Then, Mr. Smith, if you think it is not a sufficient answer, you can ask further questions to bring out whatever point you have in mind.

Mr. Smith: Well, your Honor, please, I certainly do not want to take issue with your Honor but I asked him if there is anything tangible. Your Honor certainly clarified

the question. The answer is a simple answer, it either exists or it does not. If so, what is it.

Hearing Examiner Pack: Then, Mr. Shapiro, I will ask that you continue with your answer. However, bear in mind Mr. Smith's precise query, that is, with respect to [fol. 276] anything of a material or tangible nature supplied to the small dealer. You may go ahead.

The Witness: It is very difficult for me, your Honor, because there are the products factors, there are the service factors, there is a reasoning. How to disassociate the pattern from the service or the ancillary material or why he carries patterns, is extremely difficult for me as a layman. I cannot quite define where I can stop and start. I answer only the best way I can. Certainly, sir, I do not want to answer beyond the bounds of what is proper.

Mr. Smith: Maybe I can explain it to Mr. Shapiro.

By Mr. Smith:

Q. Mr. Shapiro, if you bought an automobile and bought certain accessories to it, you would know what they were?

A. I am sorry, I do not understand.

Q. I said, if you bought an automobile and bought certain accessories, you would know what you were buying, wouldn't you?

A. Yes, sir.

Q. You would know what you were paying for, wouldn't you?

A. Yes, sir.

Q. And now these small merchants are buying patterns from Simplicity, are they not?

A. They are.

Q. Is there anything else along with the pattern that you charge them for? You charge them a certain price for the pattern, do you not?

A. Yes, sir.

Q. I think it is 60% of retail, isn't it, or 40%, whichever it is?

A. However you use the term, it is 60 and 40.

Q. He pays you for that?

A. Yes, sir.

Now, my question is, is there anything else other than the pattern tangible—Mr. Simon says it isn't tangible, I say it is—anyhow, it is paper or you can see it—

A. Yes.

Q. —that you give him along with the pattern that is free? Does that make it clear?

A. Yes. And I could re-itemize the posters and the [fol. 277] mailers and brochures and dealer helps. But it seems to me that it is very important because the crux of it is why he wants patterns and why he would sell the merchant who he suspects is going to be unprofitable for us. That is the crux of this matter.

Mr. Smith: That is not answering my question.

Hearing Examiner Pack: Does your question contemplate inclusion of services, Mr. Smith, along with anything tangible in the nature of a commodity?

Mr. Smith: No, sir.

Hearing Examiner Pack: You did not intend to include the services?

Mr. Smith: No, sir. I do not know of any services which they give them.

Hearing Examiner Pack: I mentioned the word "services" because I think it was referred to either by you or Mr. Shapiro a few minutes ago, and I just wanted to be sure whether you included that in your question.

In other words, you are asking Mr. Shapiro what the small dealer gets from Simplicity in addition to the pattern itself?

Mr. Smith: I only went into that, your Honor, because Mr. Simon gave the impression that they were giving them this magazine, "Modern Miss", giving them this and giving them that in addition to the pattern. And I am trying to find out what it is.

Mr. Simon: He will just tell you if you will let him, Mr. Smith.

Mr. Smith: I am not going to ask him to go into what his idea is of servicing. I do not know what it is. This is an adverse witness, and I do not know what his answer is. However, I am trying to make this re-direct examination if possible and not go far afield in something else.

Hearing Examiner Pack: As I understand it, what you

have in mind is promotional and advertising material primarily. Is that the principal point?

Mr. Smith: Yes, sir.

Hearing Examiner Pack: Then, Mr. Shapiro, can you answer that for us, please? What does the small [fol. 278] dealer get in addition to the pattern insofar as promotional and advertising material is concerned?

The Witness: The small dealer gets the same material that a department store does, which the syndicate variety does not get. They are posters, the various brochures during the course of the year, which are aids to departmental operation, the creation of the magazine and the programs behind them which are available to department stores and small stores alike.

I think that this is somewhat repetition of what I said.

By Mr. Smith:

Q. Do you have any of those things?

Mr. Simon: Any what, Mr. Smith?

The Witness: Yes, I have some of them.

Mr. Smith: Brochures and posters.

Mr. Simon: I have two brochures here. Would you like to have them identified for the record?

Mr. Smith: I would like to see them, that is all.

Mr. Simon: Would you like to have them marked for the record?

Mr. Smith: I just want to look at them.

Mr. Simon: I would like to have them marked just so the record will show what we are talking about.

Mr. Smith: If you refuse to let me look at them, you can just take them.

Mr. Simon: Excuse me. What were you going to say, Judge?

Hearing Examiner Pack: I was going to say, for the present, if there is no objection, just let Mr. Smith see them, and then he or you can determine whether you wish to have them marked for identification.

Mr. Simon: Very well.

Mr. Smith: Since I have seen them, I am willing to mark them for identification.

Hearing Examiner Pack: You wish to have them marked, Mr. Smith.

[fol. 279] The next exhibit number, Miss Reporter, will be 55. So, let one of these be marked Commission's Exhibit 55 for identification and the other one Commission's Exhibit 56 for identification.

I take it the order does not matter, does it, Mr. Smith?
Mr. Smith: No.

(The documents referred to were marked Commission's Exhibits 55 and 56 for identification.)

By Mr. Smith:

Q. Mr. Shapiro, I hand you Commission's Exhibits marked for identification 55 and 56. Aren't those advertisements of Simplicity Patterns?

A. 55, the brochure, is labelled, "Border Prints," which is a type of fabric. And I would presume, and it is, a story on border prints and how to trim windows with border prints. Border prints aren't any more interesting to Simplicity Pattern Company than any other fabric or any fabric at all.

That is sent to them to show what is new in the market and how to treat it.

Q. What about these numbers in here, do they mean anything—"These Simplicity fashions for every one have special border-designed styles"? Are those numbers appearing there pattern numbers of Simplicity?

A. It is certainly logical for us to tie in our own merchandise.

Q. I am not asking you what is logical, Mr. Shapiro. I am asking you whether those numbers there on those prints are Simplicity Pattern numbers.

A. Yes.

Mr. Smith: That is on Commission's Exhibit 55 marked for identification.

By Mr. Smith:

Q. Now, on Commission's Exhibit 56 marked for identification, doesn't this contain Simplicity Pattern numbers and styles, also?

A. I would prefer to answer that after you have described what the booklet itself is.

[fol. 280] Q. You describe it.

A. This booklet involves sheers—which is another type of fabric—and there are several pages regarding sheers, the properties of the fabric; the sources of supply, where you can get sheers; how to sew sheer fabrics so that he can communicate to his customers.

And we continue that kind of information to synthetic miracle fibers and other things that nobody knows much about. We don't need that to sell our patterns. If we use our patterns to describe sheers in use, or border prints in use, nevertheless, it is not to infer that we produce this to show a few numbers of our patterns.

Q. And it is an advertisement of your patterns, is it not?

A. By the furthest stretch of the use of the term, sir.

Q. Well, does it contain styles of Simplicity Patterns with the numbers on them?

A. It does.

Mr. Smith: Any objections to these?

Mr. Simon: No, sir.

The Witness: The purpose of those numbers is so that he can make up models on his floor. This comes out months before the patterns and stock. We are not selling those pattern numbers to the merchant. We give him those numbers so that he can make show windows of model garments. This has nothing to do with the consumer.

Mr. Simon: I take it they are offered in evidence, Mr. Smith?

Hearing Examiner Pack: Mr. Smith, as I understand it, has offered the two exhibits in evidence, and Mr. Simon has stated, as I understand, that there is no objection.

Therefore let them be received in evidence, Miss Reporter, as Commission's Exhibits 55 and 56.

(The documents referred to, heretofore marked for identification Commission's Exhibits 55 and 56 were received in evidence.)

By Mr. Smith:

Q. Is there any material, publications or otherwise, that you furnish the small merchant that does not come under [fol. 281] the category of Simplicity advertising?

A. I think that anything a company issues would have to come under the broad category of advertising, sir.

Q. Of Simplicity advertising?

A. Yes, we put our name on everything we issue.

Q. Mr. Shapiro, Mr. Simon asked you something about the cost to the company of giving a standing debit to everybody, did he not?

A. Yes.

Q. I have forgotten what figure you gave. Do you recall it?

A. Which figure, Mr. Smith, how much it—the cost to expand the debit to all customers?

Q. Did he ask you that question? I think he did. Did you answer it?

A. The figure was in excess of \$10 million, the figure that I submitted to Mr. Simon.

Q. Did you have any accountants or auditors audit your books and records or the books and records of any of those dealers to ascertain that figure?

A. Not accountants, but that is a figure that exists in our office records. Because, we know exactly how many stocks are outstanding; we know the composition of the stock, we know on our books what the standing debit account is and a subtraction of one from the other makes the figure that I have submitted.

Q. Why do you put it as cost? Do you figure you lose it?

A. What do you mean "cost"? I do not understand the question.

Q. I am trying to get what you mean by putting it at cost. It would cost you \$10 million to put out standing debits and all your accounts—

A. Well, I do not know what other expression to use. That is the amount of money involved as the label for what these patterns, the number of patterns involved, would stand for.

Q. That would mean to put all of the small dealers or everybody on the same plane as it would Woolworth, is that right?

A. Yes. It would involve an adjustment in inventory—an inventory shift of over \$10 million.

Q. All right. Well now, how much standing debit does

Simplicity have outstanding in chain stores, including Woolworth and all of them—all stores?

[fol. 282] A. All stores. I believe that the figure would be approximately \$4 million, perhaps a bit higher. But it would be in that neighborhood.

Q. By standing debit, do you mean that that is the stock where Simplicity retains the title to it?

A. Yes, sir.

Q. And you have somewhere between \$4 million and \$5 million out now, is that right?

A. I am pretty sure it would fall between those two figures submitted.

Q. What percentage of that, would you know, is with the big chain stores like Woolworth and so forth?

A. Half. Half, but that is a calculated guess on my part.

Q. Half?

A. I would say half.

Q. Who has the rest of it?

A. Merchants.

Q. What kind of merchants?

A. Small merchants, medium sized merchants, department stores—

Q. Some small merchants have some standing debit?

A. Yes. I think that exhibit 46, perhaps, may indicate how many there are in the Washington area. But some small merchants have standing debits. They are in the minority, but there are some that have.

Q. But, on the small merchants, you charge them interest of five per cent on standing debits, don't you?

A. Yes.

Q. And on the big ones you don't?

A. No, on the big ones we do not.

Q. Why is that?

A. Well, the standing debit in the pattern industry came in long before Simplicity started doing business. This existed in the industry, and we proceeded to open up our accounts on the same basis.

Now, actually, when we go or get an inquiry from some small dealer, our sales representative visits, and he must at that time come to a conclusion as to whether the small merchant can sell enough patterns, if he can be profit-

able to us, why he desires patterns beyond his simple expression that he would like to have them. He has to gauge the seriousness of his intention toward the fabric business, he had to gauge the possible good health, credit-wise, of this customer, or potential customer, at that point, and finally the degree of the seeming desirability of [fol. 283] the account will, in large part, determine whether he gets a standing debit—whether he gets or pays for the stock in total or in part.

Q. Well, some of those accounts on Exhibit 46-A are pretty small that have standing debits, aren't they?

A. Some of the accounts on Exhibit 46 are pretty small.

Q. That have standing debits.

A. I do not remember which ones have standing debits and which ones do not have.

Q. Let's take a look at it and see if we do not find some of them are ordinarily pretty small.

A. But the small merchants who have outstanding debits in the country are in the minority. I merely suggest to you they do exist.

Q. Take a look at this and see if you do not find that some of them on there are pretty small and have standing debits.

A. You must bear in mind, Mr. Smith, how we are using the term "small"—whether they end up with the label "small" because they do a small business, or whether that applies to all independent merchants as to be contrasted with the syndicate variety stores.

Of course, we get into a matter of language.

Q. Look at the Bruce Stores.

Hearing Examiner Pack: Let the record show that Mr. Smith and Mr. Shapiro are now talking about Commission's Exhibit 46-A through -H.

Mr. Simon: Is that Dotson, Mr. Smith?

The Witness: I am looking for the column "Standing Debit."

Mr. Simon: Mr. Smith, is that Bruce Store Dotson?

Mr. Smith: Yes.

Hearing Examiner Pack: Off the record.

(Discussion off the record.)

Hearing Examiner Pack: On the record.

By Mr. Smith:

Q. Read this into the record.

A. Would you ask the question again please?

Q. You have before you Commission's Exhibit 46-A. [fol. 284] Having looked at the Bruce Stores, Incorporated, and under the column there headed "Standing Value,"—and you have just been told by your counsel that that is the column for standing debit. Is that correct, Mr. Simon?

A. Yes, sir.

Mr. Simon: I am sorry.

The Witness: Yes, sir.

By Mr. Smith.

Q. That is \$250, right?

A. Yes, sir.

Q. On which he pays five percent interest?

A. Yes, sir.

Q. Can you tell from that exhibit how many patterns Bruce Stores sold?

A. Yes, sir.

Q. How many?

A. He sold \$178 worth of patterns.

Q. That is during that year?

A. During some period. It is very small; I will just presume it is for a year.

Mr. Simon: 1954.

The Witness: It is for the year.

Mr. Smith: This Exhibit 46 is for the year 1954, as I understand it.

Mr. Simon: That is what the record shows.

The Witness: Yes, but if the store came in in the middle of the year, it would probably be his total figure for a given period.

By Mr. Smith:

Q. I think it shows when he came in: 2/15/54.

A. Almost a year.

Q. Well then, what would that be? In ten and a half months of 1954, Bruce Stores sold \$178.57 worth of patterns, is that right, according to that exhibit?

A. Yes, sir.

Q. He is a small dealer, isn't he?

A. Yes, sir.

Q. Do you find any other small ones on there similar to Bruce Stores?

A. Do you wish me to look, Mr. Smith?

Q. If you please.

A. Here is Ayres 5 and 10 Cent Store which indicates a \$75 standing debit.

[fol. 285] Q. \$71

A. There is H. A. Cohn, \$703.

Q. All right, sir, go ahead. State the debit and the amount of the sale, if you will.

A. All right. Shall I repeat?

Q. Go right ahead.

A. Ayres 5 and 10 Cent Store has indicated a standing debit of \$75. This store did \$703 in Simplicity Pattern business in 1954.

Q. You don't need to go through all of them. Just pick out any you want to.

A. You pick them, Mr. Smith. I do not know what the question is that you wish me to answer, outside of identifying them.

Hearing Examiner Pack: Off the record.

(Discussion off the record.)

Hearing Examiner Pack: Back on the record.

By Mr. Smith:

Q. Here is one over here on 46-H, Greenbelt Consumer Services (Wheaton Co-op.). That has a standing debit of \$250 on which they pay five per cent. The contract was entered into on November 1, 1954, and in two months they sold \$33.36 worth of patterns. Is that right?

A. Yes.

Q. I won't go into any more. So there does not seem to be much of a set rule as to who gets a standing debit, does there, Mr. Shapiro?

A. Well, there can't be, because when Mr. Dotson sends us a letter of inquiry and our sales representative enters

the store, he has to make his estimate as to what kind of a customer and what kind of a risk and what kind of volume is going to emanate out of that store by the appearance of the store and by whatever conclusions he arrives at from speaking with Mr. Dotson.

This particular store, by the volume indicated to me and the discard ratio that I saw—why, Simplicity is crazy to service that store, if we use economic sounding, let alone a standing debit, whether he had a full one or whether he owned the entire stock, because that discard ratio was 60% [fol. 286] or 70% of all total patterns shipped. The stock has ceased to have significance as to whether Mr. Dotson is a suitable outlet or not for Simplicity. But, Simplicity still will not terminate Mr. Dotson the part of your service for 54 years if Mr. Dotson pays his bills and conforms to standard practices.

Q. Well, now, you charge in both of those instances 5% interest on the standing debit of \$250 each. Now, I gather from what you said that your man goes in there and looks over the prospective customers, and if he appears to be a good credit risk, you may give him a standing debit?

A. Yes.

Q. Well, now, the mere fact that he pays a 5% interest is not going to save the investment, is it, if he is not otherwise a good risk?

A. I do not understand. Save the investment?

Q. Well, you have calculated that this man is a good risk, or you would not give him the standing debit. Isn't that right?

A. We would have preferred that he buy the stock, perhaps, rather than the standing debit. But as long as he is using our money to enter business and to possibly create a permanent loss and turnover of the stock because his sales are poor, why we do the best we can in estimating it. As a matter of fact, here is this merchant with this tiny, tiny volume of, perhaps, \$10 or \$12 a month—Then I just reminded myself that Mr. Dotson testified here that he, in addition to this, put in Butterick Patterns. Well, good for him. But that is certainly not good for us, not because he puts in a line of a competitor of Simplicity but because obviously the store cannot afford the one pattern line and

get a sale and turnover, and here he has two. I presume if he had a full standing debit from all of the pattern companies, he would have five.

There are, perhaps, approaches to these things. I can only say to you, (1) that it has always been prevalent in our industry, as a means of marketing patterns, and (2) I would not know how to approach it any other way. We protect [fol. 287] the general situation by our total attitude toward whether this merchant is profitable or not. Our method of handling is; we ignore it.

Q. Well, the point I am trying to get at is that you said the situation here in a metropolitan Washington area was, I believe, typical through the nation.

A. Yes, sir, I believe it is, sir.

Q. And if that is true, you are giving standing debits at interest of 5%—

A. Yes, sir.

Q. To many, many small merchants throughout the country?

A. Yes, sir.

Q. And many, many merchants throughout the country, independent, that is, you do not give standing debits to?

A. Yes, sir.

Q. And they pay for your initial inventories within a certain 30 days or whatever it is?

A. Yes, sir.

Q. Now you apparently have no rules by which to determine who gets the standing debit and who doesn't. What I am trying to get at is how you do it.

A. Our policy?

Q. Why you give it to some and not to all.

A. Our policy is a rule of thumb approach. We do have a policy, to the extent that we come in and try to analyze. I am sure that we analyze situations incorrectly, Mr. Smith. We must, because there is a certain amount of guess work on our part. And, when a store is as poor for us as the figures of Mr. Dotson indicate, it is obviously a mistake on our part.

Q. It isn't just Mr. Dotson.

A. But, I do not know how we can protect ourselves against it.

Q. There is another one here that I pointed out on Com-

mission's Exhibit 46-H which appears to be just like Mr. Dotson. That is, a Green Belt Consumer services on 46-H. They sold \$33.36 worth of patterns in two months and a \$250 standing debit at 5%.

A. Mr. Smith, while I don't—

Q. I just don't want to single out Mr. Dotson. There are many others like him, according to your testimony, throughout the country. There must be thousands of them. [fol. 288] A. Of course, we have more than 6,000 customers who do under \$400 a year with us and they are a big loss to us. I have so stated. And they are undoubtedly on varying terms of initial stock cost.

Incidentally, Mr. Smith, the taking of a store that opened in November for two months—in the Christmas months, November and December, when your volume is low—I am sure you realize, isn't an example for anything. Not that I objected to it as an example, I mean.

Q. Now, tell me something about how Simplicity started off. How long has the company been in business?

A. We started the company in the fall of 1927. I believe the first shipment of goods that we made was in February of 1928.

Q. How did you sell your patterns at that time, direct or through wholesalers?

A. Both.

Q. Who were your customers then? I mean as to class and type?

A. We have both department stores and small merchants.

Q. When did you first go into the chain store business?

A. I believe that it would be 1930 or 1931.

Q. Then, up until 1930, all of your customers lost money on the sale of patterns, is that right?

A. No. The pattern business was radically different in 1927-28 than now.

Are you talking about our customers or did you say Simplicity?

Q. Customers.

A. I am sorry, I misunderstood the question.

I believe that the department stores lost money on patterns then, and the small stores did not have patterns by far and large. They did not carry them to the degree they

now do. Then it was an exception for a small merchant to have patterns; now it is the commonplace.

Q. Now you stated, you testified that a store that sells \$400 or less, that Simplicity doesn't make any money off of them. Is that right?

A. Yes, sir.

Q. Have you ever had any audits or accounting studies made of that?

[fol. 289] A. Well, we have perpetual studies and application of cost going on all the time. Internal cost—

Q. Do you have any profit and loss statements or accounting studies with you?

A. No, sir.

Q. Well, then, you do not know, do you?

A. Yes, Mr. Smith.

Q. You know but you do not have any records with you?

A. I think that our annual statement indicates very clearly how much we ship, how much comes back. If you want to increase the discount ratio by 10%, 5%, 50%, you would come to an exact mathematical conclusion from our published report. It is there.

Q. Well, you do not have any figures here with you to put in evidence, any cost figures to show that you don't make a profit on \$400 annual sales, do you.

A. Well, we know what a pattern cost us; we know what servicing costs us in addition to the facts I have here, and it is a very easy thing to compute for the purpose of discussion and argument. Do I have it carried to an exactitude—No, I do not have it here.

Q. You do not have it. How many stores do you estimate there are throughout the United States selling \$400 or less of Simplicity patterns?

A. I figure that we have between 6,000 and 6,500 merchants in that category, sir.

Q. Why do you sell them if they are unprofitable?

A. We sell those merchants because we started with them in 1927 and 1928. In those times—and that we foresaw as an opportunity of getting into the business—the small merchant by far and large did not sell patterns. The average pattern in those days sold for, well, in excess 50¢. And, remembering the price structures of that day, that was high. The inventory of paper patterns ran to a couple of

thousand dollars by the McCall Company, the Pictorial Review Company, Butterick, and other companies of their day. They did not seek the small business, the small merchant. He could not afford to carry patterns. They did business with the larger merchants and occasionally a small merchant.

[fol. 290] We, on the other hand, saw patterns in the purest sense as a textile accessory. And, therefore, we went to the large drygoods jobbers like Carson, Pirie, Scott in Chicago and Rice-Stex in St. Louis and others, and said:

"Look, you are selling goods to thousands of small dealers. These fabrics, particularly cotton goods"—this was the age of greatest synthetic fabrics—"are selling for 10¢, 12¢, 15¢ a yard. It cost as much for a pattern as it does for a length of dress goods. You are never going to develop beyond certain levels unless you do something."

They agreed. We had no difficulty in getting the wholesalers to carry Simplicity patterns as an adjunct to their piece goods departments, and we opened up with this small merchant. In those days our patterns retailed at a uniform price of 15¢. So, she spent 50¢, 60¢, 70¢ for material, and she got a pattern for 15¢.

At the same time, I personally would travel was traveling the country, calling on department stores and point out to them the reasons why they should put in Simplicity and we sold a good many stores. But, we did not have the large distribution across the board with the larger stores we do today.

In 1930, with the onset of the Depression, our pricing policy, our attitude and the relationship of the price of patterns to total textiles proved that we were right, and/or lucky because we certainly fit into the picture.

At that time I succeeded in getting S. H. Kress, the first of the variety chain stores, to put in Simplicity patterns, and we opened up this new avenue of distribution which heretofore other pattern manufacturers had simply ignored. And we were successful there, too. And, now, all this time the establishment of our brand name in all the stores in hamlets throughout the country served to increase its popularity and in due time, with the popularity created for it by both the small merchants, by the syndicate store sales, and [fol. 291] by the department stores who were then carry-

ing it, Simplicity grew to where our acceptance in the large store became a fact.

And now, we have always thought of ourselves as the common denominator in the pattern business, and that is, that we sell our patterns at the lowest possible price for the best possible value and that it is to our interest to have a Simplicity available in every place that is reasonable for it to be so. If we can get it as popular as Wrigley Chewing Gum or Coca-Cola, so much the better.

And, as we started other programs—advertising, as you call them—promotional and educational programs, we realized that our obligation and our relationship to all of these small dealers throughout the country was something that was desirable to maintain. Therefore, we have always adopted a total auditing cost accounting attitude toward the conducting of our business and have never placed an individual stress on the volume, the individual merchant has delivered for us. We think that we have built a healthy business by that means. I think our statement indicates it. But, also it has not been completely altruistic on our part. Nevertheless, we have contributed a great service to smaller merchants that they had not before our entry into the field and will not probably have if we have to retreat from that position.

Q. What do you think would be the result if it were the attitude of all American business to sell their merchandise to small merchants at a price where they cannot make a profit?

A. Mr. Smith—

Mr. Simon: I object to that question, Judge. I do not think that has anything to do with this case.

The Witness: I would like, Mr. Simon, to—

Mr. Simon: I will withdraw the objection.

The Witness: The degree that this operation has to be defined between its being a product and being a service is paramount. Point 2, if we could sell our patterns outright, and the smaller merchant or large merchant could buy as many or as few as he wanted, the establishment of, perhaps, bulk discounts, etc., would be a simple matter. We have [fol. 292] here the greatest single problem—the unknown—this discard return, which is not small in relationship to

the business. I know of no other situation that exists of this kind.

We could conform to what I think your basic attitudes are as to how business should be conducted very easily. This happens to be a problem of the nature of this business.

Have I answered your question, sir?

By Mr. Smith:

Q. I suppose you have done the best you could at it.

A. I will try again, sir, if you want me to amplify the matter.

Q. I have no mind to set you off. If you want to make a further answer, you may go right ahead.

A. I asked you if I had answered the question. I thought I had answered it.

Hearing Examiner Pack: Off the record.

(Discussion off the Record.)

Hearing Examiner Pack: On the record.

By Mr. Smith:

Q. Those small stores that you spoke of, they were the starting point of the Simplicity business, weren't they? They were at one time, at least, and are now, according to your figures, the backbone of Simplicity business?

A. Well, I just don't know how you use the word "backbone". From a purely commercial point, it may be that the small store has outlived its usefulness if we looked at it in a cold-eyed manner, because the figures that I have outlined to you are so far beyond, you know, any possible lack of proof that we could submit on our part.

But, I think that the condition of the pattern industry today, in an age where mechanical contrivances and speed-ups and improvements of all sorts of things have minimized effort and work, in doubling its sales figures in the past ten years, when so many laymen wonder do women still [fol. 293] sew, indicate the things that we have done in the field—not only Simplicity, but other pattern manufacturers and perhaps sewing machine and other manufacturers. So that, more sewing is actually done than was done in that period past. There is a great trend towards "do it your-

self" as far as propaganda is concerned. This is certainly the oldest do-it-yourself industry or business that I know of. And while people don't roll their own cigarettes, they sure are making more clothes than they ever did before.

And, everything that we have done has been aimed towards tilling this soil for its markets, as they exist, but really very much more for the future. And we have preferred not to think of small merchants, department stores, syndicates or any other categories you want to devise in that manner.

Q. Well, anyway, you got your start with the small stores?

A. Yes, sir.

Q. And now you wouldn't want to be kind of like a man that gets tired of his wife and casts her off, would you?

A. I certainly would not, sir, and that is straight and unequivocal. As long as a small merchant conforms to the normal business practices of paying his bills and has a store open, he is going to get service from Simplicity Pattern Company unless it is made impossible for me to do so.

And since I have been president of this company, no merchant has ever been canceled by us. Nor, do we lose accounts except by store closure or bankruptcy or the normal loss of lease or the normal pitfalls that a shopkeeper may have. Now I think in a way that perhaps that speaks for something, don't you, Mr. Smith?

Q. Well, I am not going to comment.

The Witness: Well, I know I shouldn't be asking Mr. Smith a question. Forgive me if I have been improper, Your Honor.

[fol. 294] By Mr. Smith: "

Q. Mr. Shapiro, you testified, I believe you gave the number of persons—as I recall, a small number—who handled all the orders and shipments of all the chain outlets, did you not?

A. No, sir, I didn't say: handled the orders. I said handled the correspondence and maintenance of the account. Handling orders is a physical thing. I merely suggested that the orders that come in from Dotson and merchants of that kind are very small, and it does take as much to make

a bundle and wrap the bundle and go through this business for \$1 as it does for a package or an order that contains \$10 worth of merchandise. I was referring principally to office controls.

Q. But you keep referring to Mr. Dotson. Don't forget, you charge them 5 percent interest on that standing debit; according to that exhibit there.

A. I would be very happy never to have sold Mr. Dotson as against 10 or 20 percent interest on his standing debit. We can't come within seven city blocks of coming close to a man who has a discard ratio of 70 percent. Mr. Dotson was a mistake—if he is to be used as an example.

Q. I wasn't using him as an example any more than I was the others. I just happened to run across his name as being a small merchant who had a standing debit, and I was just asking you how come, what kind of a formula, if you had one, did you use in the determination of his standing debit. And I believe you have covered that in your testimony. Right?

A. Yes, sir.

Q. That was the only purpose I had in mind in referring to Mr. Dotson—at least at that point.

Now, the Woolworth concern has about 1,800 outlets, do they not?

A. Approximately 1,800 outlets.

Q. Every one of those 1,800 outlets are serviced just like individual stores, aren't they?

A. Serviced as individual stores?

Q. Yes, each individual outlet, if he wants patterns, sends [fol. 295] in the order to Simplicity, doesn't he?

A. Yes, he sends the order in just as any other stores.

Q. Just as any other store?

A. Yes.

Q. That is true of any other chain?

A. That is true of all stores.

Q. All stores?

A. Yes. There is no difference in the reordering or the way a monthly shipment comes to us. But the mechanical handling, both in bookkeeping and correspondence—all normal business procedures—of course, is what I was referring to, and they are extremely high in our business, which is a penny business.

Q. Now, I don't want to keep talking about Mr. Dotson, because I don't want him to be singled out for any kind of punishment, because he came here under subpoena and not of his own volition, as you know. But, as I recall your testimony, you have some 6,000 or 7,000 customers throughout the land who sell less than \$400 worth of patterns a year. Is that your testimony?

A. Yes, sir.

Q. Then, you would classify them as all mistakes, too, wouldn't you?

A. Well, I say that they are mistakes, all of them, if you want to take a cold cost-accounting point of view towards each individual customer. But, we don't do that, and we are not taking that position to any of the 6,000, nor to Mr. Dotson. And to disabuse your mind, Mr. Smith, about Mr. Dotson, I respect your function and the function of the Federal Trade Commission, and I respect it as a witness. And, it just never crossed my mind that he would be open to any punishment by us, nor that we would be able to exert any.

Q. I certainly hope not. I certainly hope not, because he is not responsible for having come here.

A. No, he is not. But his problem is to see how he can make two or more pattern lines pay the pattern companies in his particular store.

Q. I am not responsible for that.

A. Now, I have told you what our action will be. We will ignore it. If it had been McCall, their attitude has [fol. 296] been—I have read it in this room—published in their annual report. What Butterick's will be, I don't know and don't care.

We will serve Mr. Dotson as long as Mr. Dotson pays his bills.

Q. Well, I just don't want anything brought against him for anything that I had to do with his testimony. It was not his fault.

Hearing Examiner Pack: Off the record.

(Discussion off the record.)

Hearing Examiner Pack: Back on the record.

By Mr. Smith:

Q. Mr. Shapiro, you testified in answer to the questions by Mr. Simon, I believe, regarding the various costs of servicing the stores like Woolworth, Kresge and the small independent stores.

A. Yes, sir.

Q. I just wanted to ask you whether or not you have had any accountants make any cost studies on that various relationship?

A. No, sir. But, I have been in the office for thirty years. These people work all around me, and I know what people are allocated to what job and what functions they perform. I quoted certain percentages. I don't purport that they be 100 percent accurate, only in the reasonable area. There is no question about my knowledge of the application of costs of those things—in my mind, I suppose I should say.

Q. I was just asking you whether or not you had the cost studies made.

A. No, sir.

Q. And I believe your answer was, no. Is that right?

A. Yes, sir.

Mr. Smith: All right. That is all, Mr. Shapiro.

Hearing Examiner Pack: All right, Mr. Simon.

Recross examination.

By Mr. Simon:

Q. Mr. Smith asked you the question about your knowledge of the fact that all the department stores lose money [fol. 297] on patterns. Did I understand correctly that you said your knowledge was based on surveys made by the National Retail Dry Goods Association and your personal contact throughout the years with hundreds of department stores?

Again Casher was asked if Woolworth was in competition with his store in the sale of patterns, and he said, "No;" page 26. When asked why, he said:

"Because I have a trade there. Woolworth's doesn't sell piece goods, but they sell patterns, I think."

Again he was asked whether he was in competition with Woolworth in the sale of patterns, and he said, "No, no." That is page 2 of the transcript.

Mr. Smith: Your Honor, I think that while he is making a statement of Mr. Casher's testimony he ought to make a fair statement. That witness was so ignorant, he didn't know what "competition" meant.

BULING ON MOTION TO DISMISS

Hearing Examiner Pack: Since the last hearing I have undertaken carefully to re-examine all of the testimony and exhibits and with the help, gentlemen, that you have given me today, through the oral argument, I am probably in as good a position at this time as I would ever be to express my views as to the case, and particularly, whether a prima facie case has been made in support of the complaint.

I wish, first, to express my appreciation both to Mr. Simon and Mr. Smith for their able presentation of the matter in the oral argument today. It has been of material help to me in trying to resolve the issues.

It seems to me, gentlemen, that a prima facie case has been made as to Count Two of the complaint, but not as to Count One. I will try to state just as briefly as possible my reasons for those conclusions.

[fol. 298] Underlying both Count One and Count Two is this fundamental matter of the existence of competition. Are the ten cent variety stores in competition with the smaller or independent or yard goods stores in the sale of patterns? It seems to me that they are.

I appreciate fully that there are a number of distinctions which can and must be drawn between the sale of patterns by the ten cent stores, on the one hand, and by the smaller stores, on the other. They approach the problem from different viewpoints. They handle the patterns differently to a considerable extent. The facilities supplied by the two groups of stores differ considerably.

There are, undoubtedly, refinements and distinctions which can be drawn, but it seems to me that basically and basically and essentially, it is inescapable that when two business concerns, possibly located next door to each other, are selling the same item of merchandise to the same class

of customers that, necessarily and inevitably, they must be considered in competition in the sale of that article.

In some of the instances here the variety stores are located very close to the smaller stores, but whether we have any evidence of that or not, I understand that no distinction is drawn by the Simplicity Company in its sales to the variety stores with respect to the distance they are located from the smaller stores which the Simplicity Company may sell. I am not sure that the record shows here that any of them are located next door to one another, although it may show, I am not certain about that.

But if that were the situation there is nothing in the record to indicate that the operations of the Simplicity Company would be any different than if the two classes of stores were located some distance from one another.

It seems to me, therefore, that there is competition between the two groups of stores in the sale of patterns.

This matter of competition relates, of course, to both counts, both Count One and Count Two.

[fol. 299] Proceeding now more specifically to Count Two of the complaint, we next have the question whether or not patterns constitute a commodity within the meaning of Section 2(e) of the Robinson-Patman Act. I think they do. Here again, there must be made certain differences and distinctions. Patterns are somewhat unlike commodities, generally, although possibly some comparisons might be made with other articles, but it seems to me that in the broad general sense a pattern is a commodity within the meaning of the statute. I think insofar as the definition and construction of this term are concerned a rather broad, liberal interpretation should be given rather than a narrow technical construction.

I have not undertaken to run down the definitions of "commodity" in any of the large unabridged dictionaries. I have, however, looked in one of the smaller dictionaries and I notice the definitions given are rather broad.

One definition given is the word "goods". In other words, commodities are goods.

Another definition is, as I recall, that a commodity is almost any piece of salable property other than livestock, that is, other than animals. But even if there were no

definitions to that effect it seems to me that approaching the statute from a broad, common sense realistic viewpoint it should be said that patterns do constitute a commodity within the meaning of the act.

Now, if those two questions—the question of competition and the question of commodity are answered in the affirmative, as I have indicated my views to be, it seems to me to follow inevitably that a prima facie case has been made under the second count.

I understand Section 2(c) of the Robinson-Patman Act to be in effect a per se statute. I understand the statute, that section of the Robinson-Patman Act, to contemplate that, assuming, of course, the presence of the element of interstate commerce, a case is made under the statute when it is shown that a seller is selling to two competing customers goods for re-sale having connections with the sale of such goods for re-sale he is supplying to one services or facilities which he does not supply to another.

In so far as the supplying of the catalogues is concerned, the catalogues, as I understand it, are identical.

With respect to the cabinets, we do have, of course, a material difference there.

In the case of the smaller stores, the cabinets are rather expensive, well appearing, nice looking articles of furniture. They would compare probably to a fairly expensive filing cabinet in the office of a lawyer or businessman.

I believe the record shows that they are painted, at least in some instance, to resemble wood. In other words, they are made to appear attractive.

On the other hand, the cabinet or facilities supplied the chain stores are of a different type. Instead of being rather large, good appearing cabinets which can be displayed for the public to see, they are cabinets or boxes, as I believe someone has referred to them, placed under the counter. I assume that they must have compartments of some kind to separate the various types and kinds and sizes of patterns, but in any event, it seems to me it is inescapable that although there are differences between the types of facilities supplied, the company here is supplying to one type of customer a facility to be used in the sale of its patterns which it does not supply to the other type of customer.

Although the facilities, that is to say, the cabinets differ, they are used for the same purpose. In other words, they are used in the sale of the patterns to the retail public.

The complaint refers, I think, to one or two other items. But I do not understand that the record shows anything else is actually supplied to the chain stores.

I believe I asked Mr. Simon about stands supplied for the catalogues. The complaint refers to that. But I do not recall, and Mr. Simon's recollection was the same as mine, that there is any evidence in the record that any of [fol. 301] the chain stores use these stands for the catalogues. The practice seems to be simply to clear away on a counter beneath which the patterns are kept or, at any rate, very close by, a small space, possibly 14 by 14 inches, or something like that, a space simply large enough to place a catalogue on the counter. And that is the only thing used, outside of the cabinet or the box under the counter by the chain stores in the sale of patterns.

And so I think that a case has been made under Count Two of the complaint.

Proceeding to Count One we have a much more complex situation.

Here again I think what has been said with respect to the existence of competition would apply just as in connection with Count Two of the complaint. I am not overlooking the fact that at least some of the witnesses did not think they were in competition with the chain stores, but it seems to me that if all of the witnesses had so testified the conclusion would have been almost inescapable, that there is competition, that is to say, with the chain store and the smaller store selling the same pattern to the same class of purchasers. It follows, at least, it seems to me, almost necessarily that the element of competition is present.

But insofar as Count One is concerned that does not solve our problem. We still move to the very important question as to whether there is injury to competition. And by "injury" I do not mean necessarily the showing of actual injury but I mean the showing of facts from which injury to competition could reasonably be inferred.

It seems to be that that evidence is lacking here. And that is the primary reason why it seems to me Count One of the complaint must fall.

The attitude of the witnesses, that is to say, the smaller merchants who have testified in the case, seems to be about this:

That, yes, they would like to get the catalogues free, if [fol. 302] they could, and they would like to get the standing debit or a larger standing debit than they have, and they would like to get the transportation paid on the patterns which are shipped to them.

They would like all of those things, as well as the other items mentioned in the complaint, but none of the witnesses seemed to attach any real significance or importance to any of those things. No witness comes in complaining about any of those matters.

It seems to me it would be a rather strange situation for the Federal Trade Commission to undertake to give relief to a group of merchants who apparently do not need any relief. That is to say, they are indifferent about it.

I believe one of the witnesses, I think it was Mr. Wall, referring to the catalogue, stated that he purchased ordinarily 32 catalogues a year. He pays \$2.00 each for them. And he remarked that if he could save that \$64.00 it would be a help to him.

And I believe he further remarked that if he could reduce his overhead and effect the other savings he might possibly look forward to the time when he would break even on his pattern sales or might even begin to make a profit on them.

However, the same witness, I think it was Mr. Wall, stated that his loss during the past year on patterns, on all four lines, which I believe he stated he handled, was approximately \$5,000.

And so it would appear that the matter of catalogues would be a very small item in connection with Mr. Wall's pattern business. That would apply apparently to all of the other dealers who testified in the case.

In so far as the transportation charges are concerned, patterns are so very light in weight that it seems to me that if there is any article or commodity on which transportation charges would be somewhat immaterial, certainly of no great significance, it would be on patterns. I believe the evidence is that probably transportation charges averaged to each customer about \$5.00 per month.

[fol. 303] I believe that one of the witnesses in New York estimated his transportation payments at probably from \$4.00 to \$6.00 and I believe Mr. Shapiro testified that the average was about \$5.00 per month per store.

So here again it seems to me we get into the field of de minimis.

It seems to me that we are dealing with some matters, while they might affect the small dealers to some extent and while the dealers, naturally would like to save every penny they could, none of these matters appears to be of any real consequence insofar as the ability of the small merchant is concerned to continue as usual with his pattern business.

In this connection, I might mention one or two other specific items which are referred to in the complaint and for convenience and for brevity will refer to the form of the order set forth in the complaint, rather than the body of the complaint itself, simply because the matters are set forth there in a much more brief and concise form.

Under the order the first point referred to is the matter of extending to some customers longer periods of time for payment without interest charges on unpaid balances owed, while refusing to extend equally favorable terms of payment to other customers.

It seems to me that there we get into this very difficult matter of controlling the extension of credit. I do not understand that the Commission has ever undertaken to do that. It seems to me that so many intangibles enter into that matter, that it would be almost impossible for the Federal Trade Commission or any Government agency to undertake to regulate it.

The next one, of course, refers to the matter of standing debit which is, of course, a much more important item than the first one. But here again, none of the smaller dealers appear to regard the matter of standing debit as of any particular significance.

Next the complaint, that is to say, the order refers to the difference in the form of contracts, that is, the [fol. 304] contracts of the smaller customers run for a longer, or periods of time, ordinarily, than do the contracts for the larger customers. And there are other certain differences referred to in the complaint.

I do not recall, however, that any of the dealers commented about that or complained about it, nor do I recall that the record indicates that any of the smaller dealers ever tried to get a contract for a shorter period of time, or that they have really attached any particular significance to it.

It seems to me the same reasoning would apply to the next provision in the order, that is, sub-paragraph D; but the next one is sub-paragraph E requiring some customers to purchase previews, while not requiring others to do so.

I am not sure that the record establishes that actually the smaller sellers are required to purchase the previews. It seems to have been accepted that the previews are needed by the smaller dealers, not so much for the sale of patterns but for the sale of fabrics.

In any event, I do not recall that the record shows that any independent dealer ever undertook to buy patterns from Simplicity without purchasing the previews.

And here again there is no particular complaint, on the part of anybody about the previews, although I believe one of the New York witnesses did say that at one time, after he had executed a contract for a particular number, he did ask the company to reduce the amount, and I believe he stated that the company declined to do so.

The last matter is the matter of prepaying transportation on shipments of patterns to customers. I have already referred to that and will not comment on it any further.

In short, it seems to me that in so far as Count One is concerned, we are faced with a situation where there are certain differences and where, undoubtedly, the smaller dealer would like to have the advantage of those things, if he could—he is making no particular complaint about [fol. 305] it—and he does not apparently regard it as of any serious importance in the operation of his business.

I am rather impressed by the reasons advanced by Mr. Shapiro for the differences between the two groups of purchasers.

Also, there may be some substance in the argument as to public interest made by Mr. Simon. But my conclusion that Count One has not been established, that is to say, that a prima facie case has not been made with respect to Count One, rests primarily upon the proposition that there

is a failure here, it seems to me, to show any injury to competition, or any facts from which injury to competition might reasonably be inferred.

This was not a price fixing case where the practice would be unlawful and violative of the public interest per se nor is it a false advertising case where if there is a false representation about a material fact, it can reasonably be presumed and inferred that the public would be misled and might be induced to purchase the product in question, as a result of the false advertising.

We do not have that here. We have, it seems to me, an entirely different situation, a situation in which the Government in order to maintain its case, under Count One, needs to show not only the existence of competition but injury to competition.

Hearing Examiner Pack: I believe, Mr. Smith, while at the beginning I indicated my views about it—I believe I did overlook making a definite specific ruling in so many words on the motion.

The ruling is that the motion to dismiss is denied with respect to Count Two of the complaint. But it is granted, that is to say, the complaint is, under the present ruling, dismissed as to Count One.

[fol. 306] COLLOQUY BETWEEN EXAMINER AND COUNSEL

Hearing examiner Pack:

So the situation now is that the case in support of the Complaint has been concluded. The Examiner has granted a motion to dismiss as to Count One of the Complaint, and denied the motion as to Count Two.

The next step, therefore, would appear to be to proceed with such evidence as the Respondent may see fit to offer with respect to Count Two. The conference today was called at the request of Mr. Simon and it would seem that the best way to proceed would be to let Mr. Simon make such statement as he sees fit and to outline what he

had in mind in connection with the conference. Then of course, we will hear from Mr. Smith.

Mr. Simon: Judge, you previously asked me by letter whether the Respondent would offer any evidence as to Count Two and in response to that request, Mr. Smith and I had a meeting in your office in which I told you and Mr. Smith that in view of your ruling on the motion to dismiss, that you considered Sections 2 (d) and (e) of the Robinson Act as creating a per se offense; that I did not see any occasion for us to offer any evidence on Count 2 in view of that ruling, but that I would like to offer for the record evidence showing cost justification of the value of the services and facilities allegedly furnished.

I think I am accurate in saying that Mr. Smith said he would object to the introduction of cost justification and Your Honor also told us that in view of your previous ruling on the motion to dismiss, that 2 (d) and (e) were per se offenses, you would feel the rule that cost justification was not admissible in a Complaint charging a violation of 2 (d) and (e) and my purpose in asking for this conference was merely to have the record show that if your ruling were not that 2 (d) and (e) were per se offenses, to which cost justification was not a lawful defense, we would offer that evidence but I don't want to go through the useless function of bringing down books and [fol. 307] what-have-you, when you have already indicated to use that you would hold that evidence inadmissible because of the per se nature of Sections 2 (d) and (e).

If what I have said is correct, then I have nothing more to say and the Respondent will not offer any further evidence on Count Two of the Complaint.

Hearing Examiner Pack: Mr. Smith?

Mr. Smith: Your Honor, I personally feel that informal discussions—and they were informal—that were had between Mr. Simon and you in which I was present, in your office, should not be taken as anything official in the way of rulings or commitments or otherwise. As I recall it, the meetings we had in your office were entirely informal discussions; were not official rulings; were not incorporated in the record and were only intended to be informal discussions and I do not think that what we talked about in your office has any place in this record today and I object

to—as much as I can object—informal discussions between the three of us going into this record.

Now, I have rested as counsel in support of the Complaint. I have rested my case, as to Count Two of the Complaint. Your Honor has announced that you will intend to dismiss Count One. As far as I am concerned, I have nothing further to offer; no further commitments; no commitments to make one way or the other, and I certainly had no intention of the informal discussion that took place between the three of us in your office to be later on inserted in this record as any commitment on my part to anything.

If Mr. Simon has testimony to offer, I am prepared to represent the Federal Trade Commission as counsel in support of the Complaint at such hearings. If he has no testimony to offer, I move that the record be closed. I am not willing to agree and I have never been willing to agree and never will be willing to agree to any academic interpretations of the statutes involved in this case without evidence.

[fol. 308] I don't think any court in the land—certainly none that I know of,—is constituted or was ever constituted to render academic decisions. If Mr. Simon has no evidence, he is seeking merely an academic decision or interpretation of the statute without evidence. I do most strenuously object, again I say, to what took place in the informal conferences in your office being inserted in this record. I do not agree to waive any objection that the government has to any evidence that Mr. Simon might have to offer or might think he has to offer on any ground. I certainly do not intend to infer, inferentially admit, or admit in any way, the fact that he has got any cost justification and I certainly do not intend to enter into any kind or type of agreement which might infer, inferentially or otherwise, admit, or be taken to admit, that he has any kind of cost justification and if he has it, let him proceed with his testimony and make his offer of proof.

Mr. Simon: Judge, it never occurred to me that I was asking Mr. Smith to waive anything. I would like the record to be clear that I did not intend to so infer. I am not asking him to agree to anything. The rules of the Commission expressly provide for conferences to simplify

the issues. If I misunderstood him, I am delighted to know that I did. If he concedes that the cost justification is admissible in evidence and if your Honor will admit it, I would like a hearing for producing the witnesses, but if it is his position that it is not admissible in evidence and your Honor would sustain his objection, then I say that that is the very purpose of the conference, that the rule provides for—to simplify the issue. All I am trying to find out, without the burden and expense to all of us, of having hearings and witnesses come in, is whether he would object to the admissibility of cost justification and whether it would be rejected. If I misunderstood him, if he would have no objection to that evidence and your Honor would admit it, I would like a hearing for putting it in.

Mr. Smith: Your Honor, I don't feel at this time I am called on to state what my objections will be or might be. [fol. 309] This is purely an academic matter as I see it. I don't want to be arbitrary about this thing. I certainly don't want to do that but I cannot see where I am called on, prior to the offer of any evidence, to make any commitments as to what my ground of objection to that evidence might be. I have never seen the evidence. I have not the slightest idea what it is and to ask me to commit myself now, in the absence of such knowledge, as to what my objections might be, I think is asking more than what the Respondent is entitled to and I decline to give any such answer or to make any such commitment.

Mr. Simon: Mr. Smith, I merely would like to have you state on the record whether you will concede cost justification is admissible under Count Two.

Mr. Smith: I don't have to state that. I am not called on. I just stated—if you had listened to what I said—that in the absence of seeing what evidence you have to offer, I am not prepared to state what my objection to it might be.

Mr. Simon: I am taking it you are saying, under certain cost justification, evidence, whatever it might be, is admissible?

Mr. Smith: I am not making any commitments. I don't want to be arbitrary or cantankerous about this thing but I am not going to make any commitments at this time and that is final.

Mr. Simon: The rule provides for simplifying the issues. I take it then the way we can simplify the issue is by finding out whether cost justification is admissible under a 2 (d) or (e) case.

Mr. Smith: You are assuming that you have a cost justification. I deny that you have a cost justification.

Mr. Simon: I would like you to distinguish, if you would.

Mr. Smith: I am not going to distinguish anything. I am taking the position that I deny that you have a cost justification and I am not going to commit myself, inferentially or otherwise, that you have one.

[fol. 310] Mr. Simon: I just think that you must distinguish if you are going to represent the Commission in this case, between the admissibility of evidence and the proof that the evidence establishes. We are not now talking about the proof that would be established by cost justification evidence but we are talking only about the admissibility of the evidence and if it is going to be held that the evidence is not admissible then a hearing would be a waste of time. If the evidence is admissible, then I assume you would argue what it proved after the evidence had been received and if the only issue is the proof that would be established then I would like to offer the evidence and have it received and later argue what it proves, but we are now talking only about the admissibility of evidence.

Mr. Smith: Well, I have said about all I can on it. If you have such evidence, offer it. If you have not—

Mr. Simon: Will you object to the admission?

Mr. Smith: I will not tell you what I will do in advance. I am not required to. If you have no evidence to offer, I move that the record be closed.

Mr. Simon: Your Honor, I submit that the rule contemplated that he be required to state his position on the issues and that is all that the rule could have meant when they talked about simplifying the issues.

Hearing Examiner Pack: I am not sure that expression by the Hearing Examiner of his views on the point at this time would be of any particular assistance to you gentlemen but if it would be of such assistance, I have no hesitancy in repeating what I have stated to you gentlemen heretofore in our informal conferences in my office, and also what in ef-

fect, I stated in passing on the motion to dismiss at the conclusion of the oral argument on February 13, 1956.

I could of course, be mistaken in my interpretation of the Robinson-Patman Act, particularly Section 2 (e) which is the vehicle involved in Count Two of the Complaint in this case. All of us, I am sure, appreciate the hazard of [fol. 311] trying to be too sure about the proper interpretation or construction of the Robinson-Patman Act.

It is my view however, as I expressed it on the record at the conclusion of the oral argument on the motion to dismiss, that Section 2 (e) of the Act is in effect, a per se statute. My thought is that if the two elements of Interstate Commerce and the existence of competition are present, all that is required for the government to make a case under Section 2 (e) is to show that the Respondent furnished certain facilities or services to one competing customer which he did not furnish to the other.

There is, of course, left open to the Respondents I understand, the defense of meeting competition in good faith, provided in Section 2 (b) of the Act. I don't understand that that point is involved here at all; specifically, with respect to the matter of cost justification. It is my understanding that that defense is not available to a respondent in a proceeding under Section 2 (e) of the Act. I think I have indicated to you gentlemen heretofore, in our conferences, and discussions, that that was my view and I think I have also indicated that if, upon the offering of testimony relating to cost justification under Count Two of the Complaint, objection was made to such evidence, the objection would be sustained by the Hearing Examiner and the evidence not received. Of course, that does not mean that the respondent would not be permitted to make whatever proffer might be reasonable, in order to make the point clear in the record, and preserve the point for further argument if the case should reach the Commission and later should go to the courts.

My views, as expressed to you gentlemen, were and are expressed upon the assumption that such evidence—that is, evidence of a cost justification,—if offered, would be objected to. If there should be no objection to such evidence, then of course, we might very well have an entirely different situation. There may be times when the Hearing Ex-

aminer is warranted—in fact it may at times become his [fol. 312] duty, even in the absence of objection, to decline to receive into a record, evidence which he feels has no place in the record and which would serve greatly to lengthen, and encumber the record, all to no good purpose.

I don't know that that situation would ever be reached in the present case; generally speaking, I leave it to counsel on both sides to take care of their own specific cases and it is very seldom that I have had occasion to act with respect to an offer of evidence in the absence of objection. In fact, I do not recall that I have ever had occasion to do that.

My thought at the moment is that if evidence with respect to cost justification should be offered in the present case and if it were not objected to, the Examiner would inquire as to the extent of the evidence and how much it would add to the record. If the evidence was not objected to, and if the evidence could be included in the record, without too much expense, and without enlarging the record greatly, then the Examiner, as he sees the matter now, would be inclined to receive the evidence and then later, determine the question of its bearing on the case and whether or not the evidence constituted a defense to the charge.

On the other hand, if it should appear that the evidence would be very voluminous, that it might involve days of hearings and the reception into the record of masses of tabulations and cost data and material of that kind, then the Examiner would feel it necessary to raise the point himself and possibly to decline to receive the evidence in the record, although, as I have stated, care must always be taken that one offering the evidence which is rejected shall have an adequate opportunity to make a sufficient proffer of his evidence to preserve the point for use on appeal.

Mr. Simon: Judge, may I say it is my best judgment that it would take about three days for the direct examination of the auditors and there would be a substantial [fol. 313] amount of documentary supporting data to be introduced. I don't know how long Mr. Smith would take on cross examination but I would estimate three days on direct examination. That is the main reason why I don't want any of this to go through the useless gesture of something that you have concluded in advance, would not affect the outcome of the case.

Hearing Examiner Pack: I might add that while, as I already indicated, my views on the subject are definite, that is, with respect to the question of whether cost justification is available as a defense under any proceeding under Section 2 (e) of the Act, I did not mean to say that I would not be glad to hear you gentlemen on the matter if you should wish to be heard.

I wish always to be careful not to prevent full discussion and argument by counsel of any legal question which may arise. I will state, however, that as I already indicated—and in the absence of desire on the part of you gentlemen to be heard further on the matter—my views are definite and my thought at the present time is that cost justification in a case of this kind is not available as a defense. It has been my understanding that that has been the view of the Commission and its prior staff for a long time. I do not know that any court has ever expressly passed on this point. I know of no decision on the specific point, but from a study of the Act and its legislative history and a reading of authorities on the Act, that is the view which is almost universally taken on that subject.

It seems to me, Mr. Simon, that we have reached the point where the decision is yours to make. That is, as to whether you wish a hearing set for the purpose of offering the evidence or whether you think the conference today is adequate to serve your purpose.

Mr. Simon: Judge, do I understand that if evidence were offered and Mr. Smith would not object and it would be received in evidence on cost justification, that you would still not hold it was a defense to an answer under 2 (e)? [fol. 314] Hearing Examiner Pack: Yes, sir. That is correct. I don't understand that the failure to object would affect the law in any way and if the evidence should be received, and if I should continue to entertain the views which I now hold, it seems to me the evidence would simply have to be disregarded in the decision of the case. I don't understand that reception of the evidence into the record, even without objection, would make any difference insofar as the law is concerned.

Mr. Simon: For the purpose of this record, Judge, may the record show that you would hold that it was not a defense to an action under 2 (e)?

Hearing Examiner Pack: Yes, sir. The record may show that—that the Examiner's present view is that cost justification is not a defense in a proceeding under Section 2 (c); unless as a result of argument or further study of the matter the Examiner should change his mind, he would in deciding the case adhere to that view and disregard any evidence of cost justification.

Does that answer your question, Mr. Simon?

Mr. Simon: Yes, sir. Judge, in view of that statement, unless you do change your mind, I would not want to put the Respondent to the substantial expense of bringing the auditors in and going to the testimony, and I assume that the Commission would not want that burden, either. The hearings will be in New York. For that reason, sir, unless you change your mind, I would say that we will not offer any evidence under Count Two of the Complaint, and the record as far as the Respondent is concerned, on Count Two, may be closed.

Hearing Examiner Pack: If course, that means you have no further evidence to offer at all in the proceeding because you would, I assume, have no evidence to offer in connection with Count One, that having been dismissed.

Mr. Simon: I consider that is out of the case as far as we are concerned here today.

[fol. 315] Hearing Examiner Pack: In other words, you rest your case at the present time?

Mr. Simon: As to Count Two, your Honor. I consider Count One as being out of the case.

Mr. Smith: Well, I did not want to say anything else, Judge, except that I want to take the position that I am not waiving any requirements on his part to make an offer of proof if he later on wants to assign error on that question in any court.

Hearing Examiner Pack: Of course, gentlemen, that will be something which—

Mr. Smith: I wanted the record to be clear that I am not waiving his lack of offer of proof.

Hearing Examiner Pack: Very well, sir.

Mr. Smith: In the event he later on wants to assign error, either before this Commission or in any court.

Hearing Examiner Pack: Very well, sir. As I was about to say those are matters for counsel to decide.

[fol. 316] COMMISSION EXHIBIT No. 2-A, 2-B

Agreement Covering Simplicity Patterns

Agreement made this 1st day of October, 1949, between Simplicity Patterns Co., Inc. of New York, and its subsidiary, Dominion Patterns Ltd., of Canada, hereinafter jointly designated as Simplicity, and F. W. Woolworth Co. of New York, and F. W. Woolworth Co. Ltd., of Canada, hereinafter jointly designated as Woolworth.

10. Cabinets sufficient to properly house the Simplicity pattern stock in each store are to be supplied to Woolworth stores by Simplicity on memorandum. Cabinets so supplied are to be returned by Woolworth in the event of a store closing out the stock of Simplicity patterns, or if a store does not require all of the cabinets on hand to house the Simplicity pattern stock.

COMMISSION EXHIBIT No. 23-A, 23-B

Simplicity Pattern Co., Inc.
200 Madison Avenue, New York 16, N. Y.

Mr. A. L. Becker
McCory Stores Corp.
1107 Broadway
New York 10, N. Y.

Aug. 26, 1952.

DEAR MR. BECKER:

The higher average also contributes to your higher sales. It is nice to note that your monthly sales have gained [fol. 317] steadily this year and that for the first six months they were 22% higher than for the same period last year. Of course, a higher average price would not produce added volume unless it was backed up by the wide acceptance of

the Simplicity Printed Pattern features—their good styling, dramatic full color presentation and our wide promotional program.

Thanking you for your cooperation during this adjustment, and trusting that we have handled this in a way satisfactory to your organization.

Yours sincerely, Simplicity Pattern Co. Inc., Herbert Benington, H. H. Benington, Vice President

HHB:hh

COMMISSION EXHIBIT No. 32-A

April 20, 1949.

Memorandum Covering the Terms and Operation of the Simplicity Pattern Service in F. W. Woolworth Co. Stores in the U. S. and F. W. Woolworth Co. Ltd. Stores in Canada

5. Each month Simplicity Pattern Co. Inc. supplies, without charge, each of the F. W. Woolworth Co. stores with sufficient Counter Catalogs to properly service that store's pattern customers. Catalog schedules are arrived at by mutual agreement and are renewed regularly.

6. Sufficient cabinets to properly house the Simplicity Pattern stock in each store are supplied to F. W. Woolworth Co. stores by Simplicity Pattern Co. Inc. on memorandum. F. W. Woolworth Co. is responsible for the cabinets shipped to each store. Cabinets so supplied must be returned in the event of store closing or if the store no longer requires all the cabinets to house the Simplicity Pattern stock.

COMMISSION EXHIBIT No. 34-A, 34-B, 34-C

Agreement

Simplicity Pattern Company-McCrory Stores Corporation

This will confirm the arrangement covering the Simplicity Pattern Service in the stores of McCrory Stores Corporation.

Simplicity Pattern Company agrees to Guarantee All Patterns Shipped to McCrory Stores And To Assume Full Responsibility For Indemnity In Case A Customer Should Spoil Or Ruin Material Through The Use Of A Defective Simplicity Pattern.

.

Counter Catalogs

Each month sufficient catalogs will be supplied to each store without charge.

Promotion Material

Each store will receive without charge such posters and display material as is regularly issued by Simplicity Pattern Co. Inc.

As paper becomes available the stores will receive without charge a quantity of Previews in keeping with the store's sales.

Cabinets

Simplicity Pattern Co. Inc. will supply each store on memorandum sufficient cabinets to properly house its stock of Simplicity Patterns.

.

[fol. 319] Accepted: Simplicity Pattern Co., Inc., By Herbert Benington, Vice President.

Accepted: McCrory Stores Corporation, By G. C. Chambers, Vice President.

COMMISSION EXHIBIT No: 35-A, 35-B, 35-C

Agreement

Simplicity Patterns

Simplicity Pattern Co. Inc-McCrory Stores Corporation

This will confirm the arrangement covering the Simplicity Pattern Service in the stores of McCrory Stores Corporation.

Simplicity Pattern Co. Inc. agrees to Guarantee All Patterns Shipped To McCrory Stores And To Assume Full Responsibility For Indemnity In Case A Customer Should Spoil Or Ruin Material Through The Use Of A Defective Simplicity Pattern.

.

Counter Catalogs

Each month Simplicity Pattern Co. Inc. will supply sufficient catalogs to each designated McCrory store without charge for as long as it makes no charge for counter catalogs to any other of its national syndicate chain customers; and if at any time Simplicity Pattern Co. Inc. charges its other national syndicate chain customers for catalogs, it will charge the McCrory Stores Corporation a price no higher than the lowest price charged to any other of its national syndicate chain customers.

[fol. 320] Promotion material.

Each designated store will receive without charge such posters and display material as is regularly issued by Simplicity Pattern Co. Inc. If at any time Simplicity Pattern Co. Inc. supplies its other national syndicate chain customers with Previews, it will supply the McCrory Stores Corporation stores on the same basis.

Cabinets

Simplicity Pattern Co. Inc. will supply each designated store on memorandum with sufficient cabinets to properly house its stock of Simplicity Patterns.

.

Term

This agreement is to become effective January 1, 1949, and is to continue for a term of two years from said date, and shall thereafter be automatically renewed from year to year, unless not less than six months prior to the expiration of the first two-year term, or not less than six months prior to the expiration of any yearly term thereafter, either party serves upon the other written notice of cancellation by registered mail.

COMMISSION EXHIBIT No. 36-A, 36-B, 36-C

S. S. Kresge Company

General Offices
Detroit, Michigan

Simplicity Pattern Company, Inc.,
419 Fourth Avenue,
New York, New York.

June 28, 1938.

GENTLEMEN:

You will ship to each store Counter Catalogues and Fashion Forecasts in quantities agreed and these two publications are to be furnished without cost to us. [fol. 321] No publication for which there is a charge is to be shipped without a separate order from our Detroit Buying Office.

Fixtures

You will furnish without charge to us suitable and acceptable cabinets for patterns, stands for Fashion Forecasts, advertising signs, posters, etc., and while we shall endeavor to use reasonable precaution in the handling or eventual return of such property, we are not to be held responsible for same in any way.

S. S. Kresge Company, By G. R. Wertman, Vice President. Simplicity Pattern Co., Inc., By James J. Shapiro, Secretary.

COMMISSION EXHIBIT No. 37-A, 37-B

Simplicity Pattern Co., Inc.

200 Madison Avenue, New York 16, N. Y.

Please amend our present agreement with you as follows so that it will cover a stock of Simplicity Designer's Patterns to each of the following S. S. Kresge Co. stores.

Each of the following stores is to receive an opening stock of Simplicity Designer's Patterns consisting of one pattern in every size and style.

You will also supply us on memorandum the necessary cabinets to house these stocks. These cabinets will be [fol. 322] supplied in accordance with the requirements outlined in our order of November 10 and letter of November 12.

S. S. Kresge Co. By F. R. Williams.

Accepted, New York, N.Y., 12-30, 1948. Simplicity Pattern Co. Inc., By Herbert Benington.

COMMISSION EXHIBIT No. 44-A

March 9, 1955 Letter

1. Approximately 12,300 in continental United States.
2. Approximately 17,200 in continental United States.
3. Samples are being submitted (including those supplied pursuant to Paragraph 11b) which are believed to be samples of substantially all forms now in effect.
4. \$10,032,911.
5. Net number of patterns sold by Simplicity Pattern Co. Inc. in 1954—47,016,774.

We do not know the net number of patterns sold by the entire industry in 1954 but we guess that 90,000,000 were sold at retail plus at least 10,000,000 sold through other sources, primarily newspapers and by mail order.

6. 24.31%.

7. Net dollar volume of catalogs sold in 1954—\$547,358. Value of catalogs furnished to purchasers without charge during 1954—\$182,660.

8. \$669,354.

9. Photostats are being submitted.

[fol. 323]

COMMISSION'S EXHIBIT No. 44-B

10.

g
Catalogs
Furnished

	a	b	c	d	e	f*	Not Billed	Billed	h**	i
Kresge	540	\$363,451.51	\$361,870.11	\$305,111	\$368,869	\$27,014		\$122,244	0	
McCrory	195	122,161.61	145,282.56	107,019	152,090	9,834		42,710	0	
McLellan	202	125,348.09	120,537.18	86,821	100,775	8,858		35,387	0	
Woolworth	1,823	1,165,302.00	1,145,035.08	1,162,905	1,134,135	83,198		303,359	0	
Sears, Roebuck ..	308	263,980.20	289,040.73	200,732	393,513		\$18,129	90,995	2,147,464	
									@\$6.50 per 1000	

* f—Simplicity Pattern Co. Inc. has no way of computing transportation costs for these chains. We estimate the average cost of transportation for all customers was approximately \$60 per store for 1954. These chains did not pay this transportation.

** h—As to cabinets furnished (above) the purchasers have not obligated themselves to pay any part thereof, they have not paid any part thereof, and they paid no rental thereon in 1954.

[fol. 324] COMMISSION EXHIBIT No. 45-A, 45-B, 45-C, 45-D

March 9, 1955.

William Simon, Esq.,
Miller, Gorham, Wescott & Adams,
1001 Connecticut Ave., N. W.,
Washington 6, D. C.

In re: Simplicity Pattern Co., Inc.,

Docket No. 6221.

DEAR SIR:

The following documents and information are requested to be furnished by respondent in the above-entitled matter:

1. Number of customers who purchase respondent's patterns.
2. Number of retail outlets which sell respondent's patterns.
3. Samples of all types of printed contracts presently in effect.
4. Net dollar volume of patterns (after discounts and allowances) sold during the calendar year 1954.
5. Number of patterns sold by respondent and the number of patterns sold by the pattern industry during 1954.
6. Percentage of dollar volume of respondent's total pattern sales made to chain, or syndicate, "Ten cent" stores during 1954.
7. Net dollar volume of catalogs sold; and the value, at respondent's usual sales prices, of catalogs furnished purchasers without charge during 1954.
8. Net dollar volume of previews sold during 1954.
9. Current contracts and accompanying schedules, including amendments (whether by correspondence or otherwise) thereto, in effect between respondent and each of the following purchasers:
F. W. Woolworth Co., McCrory Stores Corp., McLellan Stores Co., S. S. Kresge Co., Sears, Roebuck & Co.
- [fol. 325] 10. The following information with respect to each of the foregoing purchasers for the calendar year 1954 (unless otherwise indicated):
 - a. Number of outlets which sell respondent's patterns.

b. Value, at respondent's sales prices, of year-end inventory of respondent's patterns carried.

c. Total amount, at respondent's sales prices, at which purchaser has agreed to maintain its inventory of patterns, and the total amount of purchaser's inventory above which respondent has agreed to accept the return of patterns for credit.

d. Amount in dollars of said inventory carried on standing debit, and the percentage thereof paid annually as interest thereon by purchasers.

e. Amount, at respondent's sales prices, of purchases of patterns (other than original stocks), net after discards and allowances.

f. Amount of transportation costs incurred by respondent in connection with the shipment of goods to purchaser (divided to (1) amount incurred on original stocks and (2) amount incurred on other shipments); and the amount thereof by which respondent was reimbursed by purchaser, indicating whether said transportation cost covered shipment the complete distance or only a part thereof to purchaser's outlets.

g. Value, at respondent's usual sales prices, of catalogs furnished purchaser; and the amount paid therefor by purchaser.

h. Value, at respondent's usual sales prices, of cabinets furnished purchaser at any time prior to 1955 which, so far as respondent is aware, are still in use; the amount which purchaser obligated itself to pay as purchase price therefor; the total amount paid as of the end of 1954, by purchaser as purchase price therefor; and the amount paid by purchaser as rental during 1954.

[fol. 326] i. Number of previews furnished purchaser; and the amount per thousand previews paid by purchaser.

.

Very truly yours, William H. Smith, Trial Attorney.

BW:mew

Oct. 10, 1952

Mr. S. A. Meyer,
S. S. Kresge Company,
2727 Second Blvd.,
Detroit 32, Mich.

DEAR MR. MEYER:

.

We hope you will do everything possible to have your stores keep their stocks in good, workable condition so that both you and ourselves can get the best possible sales and so that we can have the necessary healthy income from which we can make year-end payments.

In considering this matter it is also necessary to take into consideration certain other items. There is a basic differential between major syndicate chains versus independent stores—and here is what it means in dollars as far as a pattern operation is concerned.

Catalogs today cost us slightly over \$5.00 each—48% more than in 1948. While stores pay us \$2.00 or \$2.50 apiece for these, we do not make any charge for catalogs to your stores. We realize that each of your stores must have a sufficient quantity each month to take care of its customers because Catalogs not only sell patterns but also interest women in more home sewing. Every pattern purchased in your stores must also mean the sale of over a dollar's worth of sewing notions so adequate Catalogs are essential not only for pattern sales but for notions sales.

[fol. 327] At the present time your stores require and receive 14,271 Catalogs per year. Forgetting our cost of over \$5.00 each for making these, and only considering what other stores pay for them, we absorb in the case of the S. S. Kresge Company, about \$30,000. a year.

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Your sincerely, Simplicity Pattern Co. Inc. H. H.
Benington, Vice President.

HHB:hh

COMMISSION EXHIBIT No. 49-A, 49-B

January 24, 1955.

Mr. S. A. Meyer,
S. S. Kresge Co.,
2727 Second Blvd.,
Detroit 32, Mich.

DEAR MR. MEYER:

In accordance with your recent conversation with Mr. R. M. Shapiro and Mr. H. C. Raich, we are making the necessary corrections in our records covering the schedule adjustments which were discussed for your stores.

Enclosed is a list of those stores where the basic stocks will be increased and additional cabinets will be necessary. Since the space available will vary, we have listed for each store the quantity of sectional cabinets which can be used if the store cannot accommodate floor-type fixtures. The sectional cabinet measures $10\frac{1}{4}$ " high by $25\frac{1}{2}$ " wide by 21" deep and the floor-type cabinet $36\frac{1}{4}$ " high by 27" wide by $21\frac{1}{8}$ " deep. We recommend that the equipment presently in use at the stores be matched when the additional fixtures are supplied, and in handling these shipments we will make certain that this is done wherever possible.

We would appreciate your advice as to the type of cabinet required for each store as soon as possible so that we may [fols. 328-331] be certain of having the fixtures on hand at the stores when their additional stock is received.

Very truly yours, Simplicity Pattern Co. Inc., G.
Donahue, Chain Store Division.

GD:PR
Enc.

January 6, 1955.

S. S. Kresge Company

Store	Additional Cabinets Required
#74—Ann Arbor, Mich.	2—#325A or 5 #201A
151—E. St. Louis, Ill.	2—#325A or 5 #201A
153—Washington, D. C.	1—#325A or 2—#201A
167—Logansport, Ind.	1—#325A or 3—#201A
186—Philadelphia, Pa.	4—#201A
218—La Grange, Ill.	2—#325A or 6—#201A
225—Boston, Mass.	1—#325A or 3—#201A
241—Detroit, Mich.	5—#201
242—Peoria, Ill.	1—#325A or 3—#201A
344—St. Louis, Mo.	0
393—Richfield, Minn.	3—#325A or 9—#201A
417—Kankakee, Ill.	1—#325A or 3—#201A
491—Blandensburg, Md.	2—#325A or 6—#201A
509—Upper Darby, Pa.	2—#325A or 6—#201A
564—Fostoria, Ohio	1—#325A or 3—#201A
587—Woodbury, N. J.	2—#325A or 6—#201A
601—St. Louis, Mo.	1—#325A or 3—#201A
605—Allen Park, Mich.	1—#325A or 3—#201A
606—Cleveland, Ohio	2—#325A or 6—#201A
613—Kenmore, N. Y.	1—#325A or 3—#201A
614—Cleveland, Ohio	1—#325A or 3—#201A
616—Baltimore, Md.	1—#325A or 3—#201A
620—Detroit, Mich.	1—#325A or 3—#201A
622—Silver Springs, Md.	1—#325A or 3—#201A
624—Louisville, Ky.	1—#325A or 3—#201A
628—Dayton, Ohio	1—#325A or 3—#201A
631—Dayton, Ohio	1—#325A or 3—#201A

[fols. 332-334] BEFORE FEDERAL TRADE COMMISSION

Docket No. 6221

In the Matter of Simplicity Pattern Company, Inc., a
Corporation

Excerpts from Appeal Brief—Received November 26, 1956

APPEAL FROM INITIAL DECISION OF HEARING EXAMINER
GRANTING RESPONDENT'S MOTION TO DISMISS COUNT I
OF THE COMPLAINT AND BRIEF IN SUPPORT OF SAID APPEAL

[fol. 335] The only question involved in Count I is the effect or probable effect of the practices alleged to have been committed by respondent on the secondary line of competition, that is respondent's own customers.

Ordinarily, since this appeal does not involve Count II of the complaint, it would seem to be out of place to mention anything regarding Count II. However, since the practices of respondent herein alleged and complained of are so interwoven and tied in together, it would not seem out of place to mention the allegations of Count II which contains charges under Section 2(e) of the Clayton Act, as amended. These charges will, therefore, briefly be stated.

It is alleged in Paragraph Twelve of Count II that the respondent sells its monthly counter catalogs to its "smaller customers" at a price varying from \$1.65 to \$2.00; whereas, respondent furnishes these catalogs without any charge whatever to its "larger customers" especially to its large "Ten Cent" store customers. In this connection it would seem well to state that a counter catalog is an essential publication for a retail merchant to have for the use of a customer in selecting the particular pattern she desires to purchase.

And finally it is alleged in Paragraph Thirteen under Count II that respondent furnishes to its "larger customers" pattern cabinets in which to house the customer's stock of patterns without any charge whatever and, on the other hand, requires its "smaller competing customers" to purchase this equipment.

Perhaps a word of explanation or reason may be in order regarding the charges appearing under Counts I

and II. The pattern catalogs and cabinets which are mentioned under Count II would appear to be undoubtedly services or facilities used by the purchaser-retailer in connection with the resale to the buying public of respondent's products, a situation which Section 2(e) of the amended Clayton Act specifically deals with. On the other hand, the allegations contained in Paragraph Seven (a) to (f), inclusive, of Count I of the complaint, while they do appear to be in the nature of services or facilities; yet they could not be considered as having been furnished in connection with the resale of respondent's product, but would seem to be properly termed as services or facilities or concessions furnished in connection with the purchase of respondent's product from respondent by the retailer.

In summing up this situation it would appear that the allegations contained in both Counts I and II constitute [fol. 336] the furnishing of services and facilities by the respondent to its competing customers, the difference being that the matters alleged in Paragraph Seven (a) to (f), inclusive, of Count I are believed to be services and facilities rendered in connection with the purchase of respondent's patterns by its retail customers, while the services and facilities alleged in Paragraphs Twelve and Thirteen of Count II of the complaint constitute services and facilities rendered by respondent in connection with the resale of respondent's patterns by its retail customers, as covered by Section 2(e) of the amended Clayton Act. In this connection also it may be noted that Section 2(e) of the amended Clayton Act as referred to by the hearing examiner in his initial decision is a per se statute. It means, among other things, that any question as to possible injury to competition is irrelevant and immaterial. This is not true, however, as to the allegations of the complaint appearing in Count I which are lodged under Section 5 of the Federal Trade Commission Act. With respect, therefore, to the case in so far as Count I is concerned, counsel for the respondent contended and the examiner held that it was necessary to prove either actual injury to competition or facts upon which injury could reasonably be inferred.

We accept the examiner's view that under Count I injury to competition must be shown or reasonably be

inferred from facts actually proved; but we do not accept his view that no injury to competition has been shown.

The foregoing, we believe, fairly sets forth in brief summary the allegations of the complaint and the case presented.

The Hearing Examiner's Ruling with Respect to Count I

Based upon his views, as stated in his initial decision, that "The record seems clearly to be without any substantial evidence warranting a finding of injury to competition," the hearing examiner concluded that Count I of the complaint has not been sustained. Accordingly the hearing examiner ordered that Count I of the complaint be dismissed.

We contend that the hearing examiner erred in his conclusion that the evidence showed no injury or probable injury to competition; and that therefore his order based upon such conclusion should be reversed, and the matter remanded to the Examiner for further proceedings in regular course.

Questions Involved

1. Are the allegations of Count I of the complaint supported by substantial evidence?

[fol. 337] 2. Does the evidence show or may it reasonably be inferred therefrom that there was injury to respondent's competing customers in the sale of respondent's dress patterns?

[fol 338] Argument With Respect to Question No. 2

Does the Evidence Show or May It Reasonably Be Inferred therefrom That There Was Injury to Respondent's Competing Customers in the Sale of Respondent's Dress Patterns?

As we view the examiner's decision he has determined in favor of the case presented by the complaint questions involving interstate commerce, competition between respondent's "smaller customers" and respondent's "larger customers"; and we do not believe that any serious question is raised by the examiner in his decision tending to dispute the fact that the allegations of the complaint are supported by substantial evidence. On the contrary, as we view the examiner's decision he rests his decision

wholly upon the conclusion on his part that a prima facie case has not been made with respect to Count I because there is a failure of proof to show any injury to competition, or any facts from which injury to competition might reasonably be inferred. This, as we see it, is the sole basis of the examiner's ruling and his conclusions upon which his decision is rested and upon which basis Count I of the complaint was dismissed.

[fol. 339] In further approaching this question of injury to competition, as we have at one point heretofore indicated, [fol. 340] we believe it is necessary to view the allegations of Counts I and II of the complaint together, for the reason that the services, facilities and benefits accorded by respondent to these larger customers as alleged in both counts are very closely related to each other.

Now, as we have previously indicated, we feel that it is necessary, in order to grasp the full extent of the discriminations in question to set forth consolidated figures involving both Counts I and II of the complaint showing just what these discriminations amount to, and with this in view there is set forth below a table of consolidated figures from both Counts I and II for 1954.

[fol. 341] First as to the Woolworth chain:

Standing debit	\$1,162,905
(Comm. Exs. 44B and 45B)	
(Value of this money at 3%)	\$34,887
(Total cost of previews sold by respondent \$669,354 divided by 17,200 retail outlets in U. S. equals \$38.92 per retail outlet. Woolworth's share of this promotional expense equals \$38.92 per store for 1823 stores)	70,951
(Comm. Exs. 44A, 44B, 45A and 45B)	
Free transportation \$60 per store for 1823 stores	109,380
Free catalogs	83,198
(Comm. Exs. 44B and 45B)	
Cabinets, value of use of \$303, 359 @ 3%	9,100
(Comm. Exs. 44B and 45C)	
Total	\$307,517

Referring to Commission's Exhibits 44B and 45B we find that Woolworth purchased during the year 1954 patterns from the respondent at a cost value of \$1,134,135. \$307,517 is 27% of the total cost value to Woolworth of these patterns, and represents in effect a saving in cost to that syndicate chain in the amount of the percentage stated.

Similar figures as to Kresge are as follows:

Value of standing debit to Kresge.	
\$305,111 @ 3%	\$9,153
(Comm. Exs. 44B and 45B)	
Previews percentage of this promotional expense 540 stores times \$38.92 per store	21,017
(Comm. Exs. 44A, 44B, 45A and 45B)	
Free transportation 540 stores times \$60 per store	32,400
(Comm. Exs. 44B and 45B)	
[fol. 342] Free catalogs (Comm. Exs 44B, 45B)	27,014
Value of use of cabinets \$122,244. @ 3%	3,667
(Comm. Exs. 44B and 45C)	
Total	\$93,251

As is shown by Commissioner's Exhibits 44B and 45B Kresge purchased from respondent \$368,869 of respondent's patterns during 1954. The concessions and benefits otherwise granted Kresge of \$93,251 represent 25.3% of this amount of purchases, and is in effect a reduction in the purchase price of this company's dress patterns to the extent of the percentage stated.

[fol. 343] We therefore submit that the discriminations of over 25% granted to Woolworth and Kresge were sufficient and were enough to give those chains tremendous competitive advantage over their small independent competitors, whether passed on in lower resale prices or used to pay for operational expenses of the chain. This type of discrimination prevents the independent businessman from competing with the chains on a fair basis. This is clearly shown by the evidence that the favored chains made a profit in the sale of respondent's products while the

independents lost money on their sale. This evidence is certainly sufficient to show probable injury, in the competitive situation stated. It necessarily follows, therefore, that a prima facie case has been established. For the hearing examiner to rule that a 25% advantage does not create a presumption of adverse competitive effect under these circumstances, and to dismiss this Count without even hearing any evidence presented by the respondent, is clear error and should be reversed.

Respectfully submitted, (S) William H. Smith,
Counsel Supporting the Complaint.

Joseph E. Sheehy, Director, Bureau of Litigation.

Robert R. MacIver, Assistant Director, Bureau of Litigation.

[fol. 344a] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 345] [File endorsement omitted]

IN THE UNITED STATES OF AMERICA BEFORE THE COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket No. 13884

SIMPLICITY PATTERN CO., INC., a Corporation, Petitioner,

v.

FEDERAL TRADE COMMISSION, Respondent

PETITION TO REVIEW AND SET ASIDE ORDER OF FEDERAL TRADE
COMMISSION—filed May 17, 1957

To the Honorable Judges of the Court of Appeals for the
District of Columbia Circuit:

Simplicity Pattern Co., Inc., a corporation, petitioner, respectfully petitions this Honorable Court to review and set aside the Order and Decision of the Federal Trade Commission, respondent herein, issued against this petitioner under date of March 13, 1957, denying petitioner's appeal from and making final the Initial Decision and Order of the Hearing Examiner dated September 17, 1956, in The Matter

of Simplicity Pattern Co., Inc., a corporation, FTC Docket 6221.

In support of this petition, and in conformity with Rule 38 of the Rules of this Court, petitioner shows:

1. Respondent issued a complaint under date of June 25, 1954, against this petitioner, pursuant to Section 11 of the Clayton Act as amended (15 U.S.C. 21), charging this petitioner in Count II thereof with a violation of Section 2(e) of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. 13). (Count I of the said complaint was dismissed [fol. 346] by the Commission and is not here in issue.)

2. Under date of September 17, 1956, the Hearing Examiner (to whom such case had been duly assigned) issued an Initial Decision and Order against this petitioner for an alleged violation of said Section 2(e) and purporting to impose sanctions thereunder. A copy of his Order and Initial Decision are attached hereto and made a part hereof. Petitioner timely appealed that decision to the Federal Trade Commission, respondent to this petition, which under date of March 13, 1957 issued its final Order and Decision, denying petitioner's said appeal from the said Initial Decision and Order of the Hearing Examiner and requiring this petitioner to file within sixty days after service upon it of said Order a report of its compliance with said order. A copy of the said Order and Decision are attached hereto and made a part hereof. Said Order and Decision was served upon this petitioner on March 21, 1957. This petition to review and set aside the said Order is filed within the time provided by said Order for compliance therewith.

3. Petitioner is a New York Corporation with its principal office in New York, New York. Hearings conducted by the respondent Commission in this matter took place within the District of Columbia. Witnesses called by the Commission to testify with respect to acts and practices of this respondent were engaged in business within the District of Columbia and testified to acts and transactions, purporting to be within the scope of the allegations of the complaint, by petitioner in commerce with businesses in the District of Columbia. Acts and practices found by respondent as a basis for its action against petitioner took place within the District of Columbia and within the jurisdiction of this [fol. 347] Honorable Court. This petition is expressly

authorized by Section 11 of the Clayton Act as amended (15 U.S.C. 21).

4. Respondent erred in issuing its said Order and Decision against petitioner in that: (a) its conclusion that competition existed between certain customers, and certain classes of customers, of this petitioner is as a matter of law contrary to the undisputed testimony of all the witnesses called by respondent (petitioner called no witnesses); (b) its findings of the existence of competition between certain customers, and certain classes of customers, of this petitioner are unsupported by substantial evidence and are contrary to all the reliable and probative evidence of record; (c) the Commission erroneously construed Section 2(e) of the said statute as making *per se* unlawful any disparate treatment of competing customers, with respect to services or facilities, notwithstanding evidence, findings or both evidence and findings, of a total absence of any adverse effect on competition flowing from such disparate treatment, and the Commission erred in construing said statute to deny a seller the defense to a charge thereunder that its disparate treatment was justified by difference in the cost of manufacture, sale and delivery between such customers, or did not have the effect on competition, prescribed in and required by said statute; (d) Count II of its said complaint is unsupported by reliable and probative evidence and the Order thereunder is contrary to law; (e) cabinets are not, counter catalogs are not, services or facilities connected with the processing, handling sale, or offering for sale of a commodity; patterns are not a commodity within the meaning of said statute; (f) the evidence shows that this proceeding is not in the public interest and will result in a hardship to the smallest businesses now dealing in petitioner's patterns; and (g) the said Order and Decision of [fol. 343] the Commission is unwarranted in scope, under the circumstances of this record, and exceeds the jurisdiction of the Commission.

Wherefore, petitioner respectfully prays that this Honorable Court review and set aside the said Order and Decision of the Federal Trade Commission, respondent herein.

Simplicity Pattern Co., Inc., a Corporation. By
(S.) James J. Shapiro, Its President.

(S.) Harold F. Baker, and (S.) William Simon, 1300 Connecticut Avenue, Washington 6, D. C. DEatur 2-7260.
 (S.) David Vorhaus, and (S.) Sidney Greenman, 521 Fifth Avenue, New York 17, New York. VANDerbilt 6-3440,
 Attorneys for Petitioner.

[fol. 349]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
 COLUMBIA CIRCUIT

No. 13884

SIMPLICITY PATTERN Co., Inc., a Corporation, Petitioner,

v.

FEDERAL TRADE COMMISSION, Respondent

On Petition for Review of Order of the Federal Trade
 Commission

Mr. William Simon for petitioner. *Mr. Harold F. Baker*
 also entered an appearance for petitioner.

Mr. Alvin L. Berman, Attorney, Federal Trade Com-
 mission, with whom *Mr. James E. Carkey*, Assistant Gen-
 eral Counsel, Federal Trade Commission, was on the brief,
 for respondent.

Before WASHINGTON, DANAHER and BURGER, Circuit
 Judges.

OPINION—Decided May 29, 1958

DANAHER, Circuit Judge: Simplicity Pattern Co., Inc.,
 petitioner herein, is engaged in the manufacture and sale
 of patterns widely purchased by women customers intent
 upon making their own garments. The case does not in-
 volve Simplicity's competitors in the pattern field, but
 discrimination favoring one group of customers by the
 furnishing of facilities not made available to other cus-
 [fol. 350] tomers on proportionally equal terms. Simplicity

asks us to review and set aside the Commission's order of March 13, 1957, that petitioner cease and desist from:

"Contracting to furnish or furnishing to any of respondent's customers counter catalogs, cabinets or other equipment or facilities connected with the handling, sale or offering for sale of respondent's patterns, unless such catalogs, cabinets or other equipment or facilities are available on proportionally equal terms to all customers competing with such favored customers in the sale of respondent's patterns."

The Commission's complaint had contained two counts, Count I brought under § 5 of the Federal Trade Commission Act¹ charging that petitioner had extended to larger customers, certain chain stores (hereinafter sometimes referred to as "Bed Fronts"), a "standing debit" under which such customers did not pay for their initial inventory of stock, a short-term contract, and prepaid transportation. Such bases for doing business had not been extended to smaller customers, particularly certain retailers (hereinafter sometimes referred to as "fabric stores"). Concluding that the record lacked substantial evidence to warrant a finding of injury to competition, the examiner dismissed Count I. Counsel supporting the complaint appealed, but the Commission affirmed, concluding that adverse competitive effect upon Simplicity's competitors or among its customers had not been established. Count I, thus, is not before us.

Count II alleged violation of subsection 2(e) of the Clayton Act, as amended,² in that the petitioner had supplied to

¹ 52 STAT. 111 (1938), 15 U.S.C. § 45 (1952).

² 38 STAT. 730 (1914), as amended by the Robinson-Patman Act, 49 STAT. 1526 (1936), 15 U.S.C. § 13(e) (1952). The subsection in pertinent part here said to be applicable reads:

"It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale . . . by . . . furnishing . . . any services or facilities connected with the . . . sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

[fol. 351] its larger customers, the Red Fronts, free monthly counter catalogues and certain storage cabinets, while the small customers such as the fabric shops had been required to pay for the same or similar items. The examiner concluded that the practices denounced in Count II violate § 2(e). Simplicity appealed, but the Commission affirmed, adopting the findings, conclusions and the order contained in the initial decision.

The Commission's opinion recited Simplicity's contention that there is no meaningful competition between the larger stores, the "Red Fronts," and the smaller independents, the "fabric shops," since the Red Fronts sell patterns for a profit while the fabric shops do not intend to make a profit. Rather they sell Simplicity's patterns as a necessary incident to their sale of fabrics. The opinion then runs on:

"... Considering the circumstances appearing in the record, this argument is not wholly without merit, but we agree with the examiner's conclusion that the two kinds of stores are in competition in the sale of respondent's patterns. An element of rivalry exists in spite of the fact that the fabric shops sell the product primarily as an accommodation. It appears that they may not profit dollarwise in the sale of patterns alone, but they recognize the value of such business for attracting customers who may purchase other goods. The two kinds of stores are vying for the same particular markets whatever their motives may be. In our opinion this sufficiently discloses the presence of competition between them.

"[Simplicity] asserts, in addition, that the cabinets have no real relationship, as the statute provides, to the 'handling, sale, or offering for sale of such' pat-[fol. 352] terns, and that dress patterns are not a commodity within the meaning of Section 2(e). There appears to be no merit in either of these contentions or various other arguments made by [Simplicity], and each is rejected."

The Commission confirmed the examiner's conclusions. His findings, so far as pertinent to our review, we now paraphrase.

Simplicity, a New York corporation, is one of the largest manufacturers and distributors of dress patterns, with sales extending throughout the United States. Its patterns are sold to all customers, Red Fronts and fabric stores alike, at 60% of the labeled retail prices of 25¢, 35¢ and 50¢, and both groups of stores retail at those labeled prices.

Simplicity supplied to the Red Fronts, *free of charge*, monthly counter catalogues which depict Simplicity's patterns and are essential to the retail sale of patterns. Fabric stores were required to pay for such catalogues a price of \$1.65 to \$2 each, depending upon the binding.

Simplicity furnished to the Red Fronts, *free of charge*, cabinets and other equipment while fabric stores were required to purchase or rent such equipment.

Red Fronts merchandised the patterns as they do any other item, and unless the patterns can show a profit, the Red Fronts will not handle them. A prospective retail purchaser may examine a catalogue in a small space on the counter beneath which, in a cabinet, the patterns are stored. On the other hand, the fabric stores usually made no profit on the sale of patterns and did not expect to do so. The fabric stores handled the patterns to promote the sale of fabrics and because the customers expected this service. "The patterns, catalog, fashion previews and other advertising material are prominently displayed and the customer is invited to sit and browse through the material, all in order to promote fabric sales," the examiner found.

[fol. 353] He concluded, despite the differences in sales methods, that the two groups of stores compete in the sale of patterns. "It is difficult to say that two stores in the same shopping area, possibly side by side, are not in competition when they are selling the same article at the same price to essentially the same segment of the public

... The catalogs supplied the two groups of stores are identical. While the cabinets differ materially in design and appearance, the fact remains that they serve essentially the same purpose—as a storage place for the patterns pending their sale to the public.

*"True, there is no showing of competitive injury. But this, as the examiner, understands, is not required in a proceeding under Section 2(e). Given the element of jurisdiction, it appears that a prima facie case is established when it is shown that a seller is supplying to one customer facilities for use in the resale of the seller's products, and not supplying such facilities to the competitor of the favored customer on proportionally equal terms. In short, Section 2(e) appears to be a per se statute, requiring no proof of competitive injury."*³ (Emphasis supplied.)

Part I

We agree that, for the purpose of establishing a prima facie case, there was discrimination favoring the Red Fronts, since there is substantial support in the record as [fol. 354] a whole that Simplicity furnished to them catalogues and cabinets free of charge while the fabric shops were required to buy or rent the identical or similar facilities.

*"Petitioners thus furnished a service connected with the sale or offering for sale of a commodity upon terms not accorded to other purchasers. . . . It is enough if the discrimination be made in favor of one who is a purchaser and denied to another purchaser or other purchasers of the commodity."*⁴ (Emphasis supplied.)

³ As to Count I, the examiner had noted, "The record seems clearly to be without any substantial evidence warranting a finding of injury to competition," as between the Red Fronts and the fabric stores. The Government had already conceded before the examiner that no competitive injury had been shown as to pattern manufacturers competing with Simplicity. As to Count II, we will demonstrate first our agreement that a prima facie case was made out. But the Examiner's understanding of the effect of such proof failed to give effect to Section 2(b), the first clause of which, applicable here, expressly permits proof of "justification," *infra*, Part II.

⁴ *Corn Product Co. v. Comm'n*, 324 U.S. 726, 744 (1945).

We agree that the Red Fronts and the fabric stores, operating in the same cities and in the same shopping area, often side by side, were competitors, purchasing from Simplicity at the same price and then at like prices retailing the identical product to substantially the same segment of the public.⁵ Simplicity would have us say, despite such facts, there was no competition here. It points to the Commission's observation, *supra*, that its argument "was not wholly without merit." Simplicity contends the Red Fronts must sell patterns at a profit while the fabric stores seek none from their sale of patterns. Their profit comes from the sale of fabrics, and they merchandise the patterns simply as a matter of service and for customer convenience. We have no doubt a pattern purchaser in a Red Front may there purchase needles, thread, thimbles, shears, tape measures and what not, each item yielding its mark-up to supplement the profit derived from the pattern sale. But both groups of stores were selling patterns. Simplicity chose to pioneer sales through Red Fronts. It decided it was good business to provide, free of charge, catalogues and cabinets which facilitate pattern sales in Red Front pattern stores. [fol. 355] Fabric stores, however, not only are not shown to have been accorded like facilities on proportionately equal terms but to be required to bear a very considerable expense, either to buy or rent comparable facilities. We may assume that had the facilities been available to the fabric stores on "proportionally" equal terms, there could be no discrimination within the meaning of the section. Section 2(e), as invoked here, subject to § 2(b) to which we will soon refer, simply proscribes as unlawful the discrimination here complained of. It says nothing about the methods to be employed in the resale of the commodity. It is silent as to the motives which actuate the "purchaser" in his handling of the product involved. But both groups sold the same article to the same type of buyer in the same shopping area. We have no doubt they

⁵ *Elizabeth Arden, Inc. v. Federal Trade Commission*, 156 F. 2d 132 (2 Cir. 1946), *cert. denied*, 331 U.S. 806 (1947); *Elizabeth Arden Sales Corporation v. Gus Blass Co.*, 150 F. 2d 988 (8 Cir. 1945), *cert. denied*, 326 U.S. 773 (1945).

are thus competitors, but whether or no, as "purchasers" from Simplicity, they come within § 2(e) in the context here applied.

We agree that there was no showing of competitive injury, and that no such proof was required⁶ to establish a *prima facie* case. Injury to competition is not suggested as an element of a § 2(e) violation. Even though absence of competitive injury was here found, that fact is immaterial to the point we here discuss. Section 2(e) was written for the promotion of fair dealing among the customers of a seller. It was intended to protect purchasers against such discrimination as might arise from unequal and *unjustified* furnishing of services or facilities to be employed in marketing the seller's goods. It would seem obvious, we might say in passing, regardless of a lack of competitive injury, Red Fronts for each \$1,000 of sales received a mark-up of \$400, while fabric stores [fol. 356] received per \$1,000 of sales, \$400 less the cost of cabinets and catalogues. Competitive *opportunities* might at least seem disparate.⁷

Thus, without more, on the facts so far treated, a "*prima facie* case" within the meaning of § 2(b) may be made out which comes squarely within the interdiction of § 2(e). But Congress has said, in effect, having in mind the purposes of the Robinson-Patman Act, there may be discrimination such as has been discussed—*unless justification can be shown*. Congress has not enacted § 2(e) in isolation—the interdiction does not stand alone. Accordingly, while a *prima facie* § 2(e) case may be developed even without a showing of competitive injury, Congress clearly contemplated situations might arise for which

⁶ "The statute is aimed at discrimination by supplying facilities or services to a purchaser not accorded to others . . ." *Corn Products Co. v. Comm'n*, *supra* note 4; *Corn Products Refining Co. v. Federal Trade Com'n*, 144 F. 2d 211, 219 (7 Cir. 1944); *Elizabeth Arden, Inc. v. Federal Trade Commission*, *supra* note 5, 156 F. 2d at 135.

⁷ Cf. *Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37, 46 (1948), a § 2(a) case to be sure, which nevertheless reflects the spirit of the legislation.

justification may exist. It specifically provided for such an exigency in § 2(b) which, in pertinent part, reads:

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in . . . facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing [herein] contained . . . shall prevent a seller rebutting the prima facie case thus made by showing that his . . . furnishing of . . . facilities to any purchaser or purchasers was made in good faith to meet . . . the . . . facilities furnished by a competitor."

We see from the first clause that when prima facie case has been made of discrimination attributable to the *furnishing of facilities*, an order terminating the discrimination may be issued "unless justification shall be affirmatively shown" by the seller. Whether *customers or com-[fol. 357] petitors* are involved as to the first portion of § 2(b), clearly that justification must be a *legal* justification, one which dispels that unlawfulness which the purpose of the Act and the public interest require to be suppressed. Then, it is further spelled out in the proviso that if a *competitor* shall *lawfully* furnish facilities, a seller may rebut a charge of discrimination by showing he has furnished facilities in a good faith effort to provide like facilities. This must be so, for neither the Commission nor the courts could countenance the unlawful furnishing of facilities by one charged under § 2(e) in order to meet like *unlawful* conduct of a competitor.* Section 2(b), then, provides for rebuttal of a prima facie case of discrimination when charged to have been practiced among a seller's *customers*, as in a § 2(e) case, and in special circumstances as noted, where the seller's *competitors* are involved.

* Cf. *Elizabeth Arden Sales Corporation v. Gus Blass Co.*, *supra* note 5, 150 F. 2d at 995, 996. The proviso portion of § 2(b) is not here involved, it may be observed in passing.

While a complete § 2(e) case may be made out which, without more and unrebutted, constitutes a "per se" case, as the examiner put it, the alleged violator under § 2(b) may go forward and establish "justification." If he affirmatively sustains his burden, there no longer is unlawful discrimination.

Part II

Here Simplicity sought and procured a ruling that no evidence of "cost justification" could have any effect on the examiner. The latter had already concluded, in effect, that the per se violation established as he found, was impervious to any such defense. He thus reflected the position of the Commission as put in its brief, that "Congress has already determined that the practice covered by Section 2(e) has the tendency and capacity to injure competition, and injury to competition is not a matter to be litigated in any particular case, either as a part of [fol. 358] the case in chief, or as a matter of rebuttal." In effect we are told, if "discrimination" arises under § 2(e), a finding of violation automatically must follow. We are at a loss to reconcile this claim with the provisions of § 2(b) expressly outlining the procedures which permit rebuttal by way of "justification" and establish the burden of proof. Indeed, the Commission actually argues to us in its brief that the rebuttal proviso of § 2(b) authorizing a good faith meeting of facilities furnished by a competitor is "obviously" the "matter of rebuttal which is referred to in the first portion of Section 2(b)." The Commission would have us eliminate the first clause, and, in effect, would thus read § 2(b) out of the case. We find this position to be completely erroneous for the reasons

* The Commission relies upon § 2(e) cases which have no bearing whatever upon our problem. Sec. 2(b) specifically provides for rebuttal by way of justification where the alleged discrimination among *customers* arises from the furnishing of facilities. No such provision is related to § 2(c) violations. Cf. *Oliver Bros. v. Federal Trade Commission*, 102 F. 2d 763 (4 Cir. 1939); *Webb-Crawford Co. v. Federal Trade Commission*, 109 F. 2d 268 (5 Cir. 1940), *cert. denied*, 310 U.S. 638 (1940).

we have suggested. The error undoubtedly underlay the examiner's conclusion as the preclusive status he ascribed to the "per se" case which in truth was no more than the prima facie case under § 2(e) to which the pertinent portions of § 2(b), as a whole, were expressly related.

The Commission has asked that we not consider this clear error on the ground that the point had not been saved of record. Had Simplicity not raised the "cost justification" issue, we agree we would be so precluded and we have repeatedly so held.¹⁰

[fol. 359] From the very outset, and persistently asserted throughout the proceedings, was Simplicity's claim that "cost justification" was available as a defense. The point was not only briefed and argued by both sides, but was passed upon by the Commission. Petitioner's answer to the original complaint, in pertinent part read:

" . . . Respondent denies that the value of any service or facility furnished to any one customer or group of customers and not furnished to other customers exceeds the difference in the costs of manufacture, sale, or delivery resulting from the differing methods or quantities in which such products are sold, distributed, or delivered to such respective customers."

Following oral argument on Simplicity's motion to dismiss which the examiner granted as to Count I and denied as to Count II, he set a conference for the simplification of issues. The transcript of proceedings then held, made part of the record, showed an announcement by the examiner that "my views are definite and my thought at the present time is that cost justification in a case of this kind is not available as a defense." An excerpted colloquy is

¹⁰ See, e.g., *Barclay Home Products, Inc. v. Federal Trade Commission*, 100 U.S. App. D.C. 46, 241 F. 2d 451 (D.C. Cir. 1957), *cert. denied*, 354 U.S. 942 (1957); *Albertson v. Federal Communications Commission*, 100 U.S. App. D.C. 103, 106, 243 F. 2d 209, 212 (D.C. Cir. 1957), and cases cited in both.

revealing.¹¹ We are satisfied that the point is properly [fol. 360] before us.¹²

¹¹ "Mr. Simon: Judge, do I understand that if evidence were offered and Mr. Smith would not object and it would be received in evidence on cost justification, that you would still not hold it was a defense to an answer under 2(e)?"

"Hearing Examiner Pack: Yes, sir. That is correct. I don't understand that the failure to object would affect the law in any way and if the evidence should be received, and if I should continue to entertain the views which I now hold, it seems to me the evidence would simply have to be disregarded in the decision of the case. I do not understand that reception of the evidence into the record, even without objection, would make any difference insofar as the law is concerned.

"Mr. Simon: For the purpose of this record, Judge, may the record show that you would hold that it was not a defense to an action under 2(e)?"

"Hearing Examiner Pack: Yes, sir."

¹²Of course a proffer ordinarily is contemplated by the Commission's rules, 16 C.F.R. 3.15(c)(3) (Supp. 1956). Here, where the examiner and the Commission itself had equated the establishment of a prima facie case with a conclusive determination of violation, it would seem to have been futile to have taken the time and to have incurred the expense of establishing cost justification where the point was deemed foreclosed. In any event, briefed and argued as it was, the point was fully before the Commission and the purpose of the rule was met. If it could be said under the circumstances that there was a failure of compliance with the rule, the Commission seems to have waived it. Its opinion recites:

"Respondent argues principally that 2(e) should be read in conjunction with other subsections of Section 2 so as to permit the introduction of evidence relating to cost justification which is provided for in 2(a). We cannot concur in this argument. 'Congress validly made the decision that conduct coming within the more definite standard of (e) was unlawful. We see no reason why the limitations contained in (a), or their equivalent, should be read into (e).' *Elizabeth Arden, Inc., et al. v. Federal Trade Commission*, 156 F. 2d 132."

The Act has not defined "justification," as used in § 2(b), where, as we have observed, the first clause permits justification to be "affirmatively shown" when the discrimination charged involves, as here, the furnishing of facilities to *customers*. We do not agree with petitioner that such justification reaches so far as to import § 2(a) criteria as matters of defense to a Section 2(e) charge. Section 2(a) makes no reference whatever to "services or facilities furnished."

Conversely, it seems equally clear that the "proportionally equal terms" reference in § 2(e) is not a complete answer, for there *could* be no discrimination, having in [fol. 361] mind the purposes of the Act, if all buyers of goods for resale may obtain services or facilities connected therewith on "proportionally equal terms." We understand Simplicity to be entitled to undertake to prove in terms of its costs of sale and delivery as related to the differing methods of sale and distribution by the two groups that the facilities were so provided, with § 2(e) in mind, that "cost justification" under the circumstances here may affirmatively be shown in order to dispel the charge of unlawful discrimination. In short, we look to § 2(b) as affording two separate and distinct grounds upon which "justification" may rest, one, such as was considered in *Elizabeth Arden v. F.T.C.*, *supra* note 5, arising under the § 2(b) *proviso*, and another such as may be developed here under the first clause of § 2(b). In the § 2(b) proviso situation presented in the *Elizabeth Arden* case, the court's recital noted at page 133 that the seller was out "to beat and not to meet" its competitors. Here no competitors are involved, but only a claim of discrimination as between the two classes of customers. Congress certainly never wrote § 2(b) with its varying facets only to have the entire section conditioned to situations arising under the proviso. Congress, we think, must have intended that the justification to be shown under the first clause of § 2(b) as to a § 2(e) charge of discrimination in "facilities furnished" to various *customers*, was to depend upon the facts in a particular case. That the term

may include a "cost justification" which Simplicity desired to establish seems clear enough.¹³

[fol. 362] Here the catalogues were apparently identical. The cabinets, while designed to contain patterns for ready reference, were markedly different. The Red Fronts sold patterns at a counter space, some 14 by 14 inches, just large enough to place a catalogue on the counter. The patterns were stored in cabinets or boxes under the counter. But the fabric stores desired "rather expensive, well appearing, nice looking articles of furniture [which] compare probably to a fairly expensive filing cabinet in

¹³ Judge Burger has authorized me to note his conviction that Congress intended not to create an un rebuttable presumption but sought actually to prohibit only such discrimination as produced a competitive injury, and certainly never intended to bar discrimination which might have a beneficial effect as promoting sales by and among competitors. He points to two sources to demonstrate the basis for his more comprehensive view, viz: (a) American Law Institute, Price Discrimination and Related Problems Under the Robinson-Patman Act (1953) at 114-115: "There seems to be little logic in making disproportionate but bona fide allowances or services to competing purchasers (which may not amount to a discrimination in price) create, in effect, a conclusive presumption of injurious effect upon competition, whereas the charge of different prices to competing purchasers is only prima facie evidence of such injury."; (b) Report of the Attorney General's Nat'l Committee to Study the Antitrust Laws (1955) at 191-2: "[T]he Committee disapproves the present disparity in the statutory consequences which attach to economically equivalent business practices. * * * Antitrust enforcement should not be complicated by diverse legal consequences solely dependent on whether a discriminatory concession masquerades as . . . 'allowance', or 'service' rather than a naked quotation in price. For, as the Supreme Court has recognized, in any reasonable implementation of antitrust objectives 'the crucial fact is the impact of the particular practice on competition, not the label it carries.'" (Emphasis added.) Cf. Chicago Sugar Co. v. American Sugar Refining Co., 176 F.2d 1 (7th Cir. 1949), cert. denied, 338 U.S. 948 (1950).

the office of a lawyer or businessman," the examiner noted. These, we take it, coincided with the fabric stores' management's desire to exploit their sale of fabrics. Their purchase of good looking furniture, a cabinet costing \$150, "made to appear attractive," might well be related to the creation of a business environment conducive to ultimate sales of the goods on which their [fol. 363] profit depended.¹⁴ Simplicity had some 6,000 customers who purchased patterns in an amount less than \$400 per year and who were serviced at a loss. Overall, 82% of Simplicity's 12,300 customers, as fabric stores, accounted for only 30% of its total dollar volume of sales, while Red Fronts operated some 3,200 separate outlets. One of the six witnesses had pattern sales of \$178 per year. The ~~cost of catalogues~~ and cabinets may have seemed of scant moment to fabric store operators who obtained their real profit from fabric sales. As the examiner said: "They emphasize that they handle patterns only to sell fabrics and because their customers expect the service. None of these witnesses regards the competition of the 10¢ stores in the sale of patterns as of any real consequence."

It seems clear that the examiner felt bound by his under-

¹⁴ Simplicity's brief before the Commission noted: "Display is an element in this effort and, generally, three or more superior quality pattern cabinets were prominently displayed. Usually these were 4-drawer, all steel, cabinets with roller bearing drawers—somewhat like modern office filing cabinets—with simulated mahogany and light colored wood finishes." The record does not show whether or not these cabinets, apparently adapted to the orderly filing of various types of patterns, frequently changing, were purchased to satisfy the particular decor of the fabric store customer, nor whether or not Simplicity sold them at cost as a matter of service to fabric store customers. Simplicity insisted that it could not be expected "to furnish free cabinets, costing several hundred dollars, to a prospective smaller customer on whose business it could not expect to earn that profit during many years." It argued that such differences in treatment as might exist "could well have been cost justified had the Examiner permitted Simplicity to do so."

standing that § 2(e) constituted a per se statute where violation automatically followed from proof that the furnishing of facilities to one group was discriminatory if another group, to serve its own ends, bought and paid for catalogues and cabinets. No evidence of "cost [fol. 364] justification" for the different treatment, he said, could rebut his conclusion which the Commission seems to have shared. We are satisfied that the Act proscribes only such discrimination as is inimical to the public interest. If a cost justification can be shown which dispels the complaint of such discrimination, Simplicity is entitled under the first clause of § 2(b) to go forward with such proof.

Of course, the burden of proof of justification rests upon Simplicity,¹⁵ but § 2(b), "infelicitous language"¹⁶ or not, certainly applies to a § 2(e), proceeding. Congress recognized that not *every* case of seeming discrimination is barred, just as § 2(f) "does not reach all cases of buyer receipt of a prohibited discrimination in prices."¹⁷ In the *Automatic Canteen* case, the Court rejected the Commission's claims as to the effect of § 2(b), and observed that considerations of fairness and convenience must be regarded as controlling.¹⁸ Perhaps it is not without significance that the Commission had not here sought to make a § 2(f) case against the Red Fronts. Here, it will be remembered, the wholesale prices of the patterns to the two groups were identical, just as were the retail prices to the public. We are bound to conclude, as we see this record, that the seller's costs may have an important bearing on the business practices alleged to have been discriminatory.

¹⁵ *Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 77 (1953); *Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37 (1948).

¹⁶ Cf. *Automatic Canteen Co. v. F.T.C.*, *supra* note 15, 346 U.S. at 78. The Court of Appeals had read the "apparently careful choice of language" as not "meaningless." See, *idem*, 194 F. 2d 433, 438 (7 Cir. 1952).

¹⁷ *Id.* at 71.

¹⁸ 346 U.S. at 78; and see the Court's note 17, *Id.*, at 75, "a reference to § 2(b) is to the procedural language preceding the proviso," and discussion at 76 and 77.

Here the Commission as a practical fact would have us [fol. 365] bar all evidence of cost justification, whatever it may be. We think the Court in its reading of the Act has pointed the way.¹⁹ We conclude that Simplicity should be entitled, affirmatively within the meaning of § 2(b), to demonstrate "cost justification." To that end it may offer such evidence as may establish the fact that *unlawful* discrimination in favor of one group as against another group of customers was not worked in any of the ways comprehended within § 2(e).²⁰ We assume the Commission in its

¹⁹ Essential fairness is the keynote, 346 U.S. at 78-81.

²⁰ Oral argument yielded no adequately explanatory answer to our question based upon a not entirely hypothetical case: can it be said as a matter of law that § 2(e) reaches as discriminatory, the rental or sale of vending machines to an industrial group which pays an appropriate charge therefor, while a drug store chain would refuse the machines even if furnished gratis? We took as illustrative an interstate purveyor of foodstuffs, coffee and soft drinks which are sold, wholesale, at identical prices per item, to industrial establishments, gasoline stations, on the one hand, and to a chain of drug stores on the other. The latter desires no vending machine clientele, it wants counter customers who while in the "drug" store, also may buy other goods, cameras, summer chairs, cutlery and what not. The profits from such sales make up for "loss leader" counter business, and the drug chain is free from the necessity of maintaining kitchens to prepare and trucks to distribute the foods and beverages. The industrial group wants to serve its patrons and to keep its employees on the job not leaving the premises for a coffee break. The purveyor could not have met the costs of providing vending machines for the gas stations except for its large volume sales to the drug chain. The charges to the consuming public are the same in each case.

The purveyor is interested in selling its foodstuffs and beverages. Its costs in making available the vending machines, with whatever capital is locked up in the venture, are an expense involved in its doing business, in meeting the particular and peculiar demands of two types of customers for its goods, one group which desires a facility of a particular type, and another which will not have the

[fol. 366] consideration of the problem will regard the purposes of the Act and the public interest criteria which should guide its thinking. To that end we set aside the Commission's order and remand this case.

WASHINGTON, *Circuit Judge, dissenting*: The disposition of this case turns on the meaning to be given to Section 2(b) of the Clayton Act, as amended. That section permits one against whom a prima facie case is made to show "justification" for his conduct. But that expression is not left undefined. Far from being all-inclusive, it in fact covers rather narrow ground. The "justification" referred to in Section 2(b) must be that described in the meeting-competition proviso to that section,¹ or such justification as may be spelled out from the provisions of the particular section—other than Section 2(b)—creating the offense alleged. This premise is firmly grounded in the decisions.² No one claims that [fol. 367] the proviso in Section 2(b) is applicable to the facts of the present case. Hence we look to Section 2(c), the section governing here, which contemplates as justification

facility under any circumstances. Both classes of customers, at prices both are willing to pay, purchase from the purveyor precisely what they want, the foods and beverages they desire to resell. We find ourselves unable to perceive that the "discrimination" has the slightest meaningful resemblance to the purposes of the Act or to any evils it was designed to prevent.

¹ *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

² See *Elizabeth Arden, Inc. v. Federal Trade Commission*, 156 F. 2d 132, 135 (2d Cir. 1946), *cert denied*, 331 U.S. 806 (1947); *Oliver Bros., Inc. v. Federal Trade Commission*, 102 F.2d 763, 767 (4th Cir. 1939); *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F.2d 667, 675-77 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940).

for a prima facie violation of that section a showing by the seller that all purchasers were accorded facilities on "proportionally equal" terms. To repeat: Congress provided only two defenses to charges against one engaged in commerce of conduct which prima facie violates Section 2(e): (1) under the proviso to Section 2(b) that the facilities were furnished in good faith to meet the facilities furnished by a competitor; or (2) within the language of Section 2(e) that in fact the facilities furnished were accorded to all purchasers on proportionally equal terms.

The Simplicity Company makes no contention that it has furnished cabinets and catalogs on proportionally equal terms to the Red Fronts and the fabric stores. Presumably if it afforded facilities on proportionally equal terms the Commission would not object. But Simplicity cannot refuse proportional equality and then argue that its refusal is justified by cost differentials—a defense available in a case brought under Section 2(a), but not in one brought under Section 2(e).

As a practical matter, "cost justification" in the present context can only mean that Simplicity may "justify" its actions by showing that many of its fabric store customers do not pay their bills, or are unprofitable to deal with because of small volume, or some similar reason. Such factors may explain Simplicity's desire to discriminate against them in favor of bigger and more profitable accounts; but I see no evidence that Congress has decreed that factors of that sort shall be viewed as legal justification. Quite the contrary, as I see it. In fact, Section 2(e) of the Act becomes almost meaningless if such defenses are to be allowed to prevail.

I would therefore affirm the Commission's cease and desist order.

[fols. 368-369] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

April Term, 1958

No. 13,884

SIMPLICITY PATTERN Co., Inc., a Corporation, Petitioner,

v.

FEDERAL TRADE COMMISSION, Respondent

On Petition for Review of Order of the Federal Trade
Commission

Before: Washington, Danaher and Burger, Circuit Judges

JUDGMENT—May 29, 1958

This case came on to be heard on the record from the
Federal Trade Commission, and was argued by counsel.

On Consideration Whereof, it is ordered and adjudged by
this Court that the order of the Federal Trade Commission
on review in this case be, and it is hereby, set aside, and
that this case be, and it is hereby, remanded to the Federal
Trade Commission for further proceedings consistent with
the opinion of this Court.

Dated: May 29, 1958.

Per Circuit Judge Danaher.

Dissenting opinion by Circuit Judge Washington.

[fol. 370] Clerk's Certificate to foregoing transcript omit-
ted in printing.

[fol. 371] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1958

No. 406

FEDERAL TRADE COMMISSION, Petitioner,

VS.

SIMPLICITY PATTERN CO., INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—August 28, 1958

Upon Consideration of the application of counsel for
petitioner,

It Is Ordered that the time for filing petition for writ of
certiorari in the above-entitled cause be, and the same is
hereby, extended to and including September 26, 1958.

Earl Warren, Chief Justice of the United States.

Dated this 28th day of August, 1958.

[fol. 372] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1958

No. 447

SIMPLICITY PATTERN COMPANY, INC., Petitioner,

VS.

FEDERAL TRADE COMMISSION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—August 29, 1958

Upon Consideration of the application of counsel for
petitioner,

It Is Ordered that the time for filing petition for writ of
certiorari in the above-entitled cause be, and the same is
hereby, extended to and including October 12th, 1958.

Earl Warren, Chief Justice of the United States.

Dated this 29th day of August, 1958.

[Vol. 373] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1958

Nos. 406 and 447

FEDERAL TRADE COMMISSION, Petitioner,

vs.

SIMPLICITY PATTERN Co., Inc.; and

SIMPLICITY PATTERN Co., Inc., Petitioner,

vs.

FEDERAL TRADE COMMISSION

ORDER ALLOWING CERTIORARI—November 24, 1958

The petitions herein for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit are granted, and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

November 24, 1958.

LIBRARY

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Office Supreme Court, U.S.

FILED

SEP 20 1958

JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

FEDERAL TRADE COMMISSION, PETITIONER

U.

SIMPLICITY PATTERN CO., INC.

**PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT**

J. LEE BANKIN,

Solicitor General,

VICTOR E. HANSEN,

Assistant Attorney General,

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

SIMPLICITY PATTERN Co., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issued to review the judgment entered in the above case on May 29, 1958, by the United States Court of Appeals for the District of Columbia Circuit, setting aside a Commission order.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 15-34) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*, p. 35) was entered on May 29, 1958. The time for filing a petition for a writ of certiorari was extended by Mr. Chief Justice Warren on August

28 to September 26, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the defense of "cost justification," which Section 2 (a) of the Robinson-Patman Act expressly provides is a defense to a charge of price discrimination under that section, is also available as a defense to a charge of discrimination in furnishing of services or facilities in violation of Section 2 (e) of that Act.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13, provides in pertinent part:

(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing

herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

* * * * *

(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

* * * * *

STATEMENT

Section 2 (a) of the Robinson-Patman Act prohibits price discriminations, the effect of which "may be substantially to lessen competition or tend to create a monopoly." It further provides that "nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered

* * *. Section 2 (e) prohibits any person from discriminating in favor of one purchaser against another purchaser of a commodity bought for resale, by furnishing "any services or facilities" connected with the sale of such commodity "upon terms not accorded to all purchasers on proportionally equal terms." Section 2 (b) provides that, upon proof of any "discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification" shall be upon the respondent and, "unless justification shall be affirmatively shown," the Commission may issue an appropriate order. It further provides, however, that a seller may rebut such a prima facie case by showing "that his lower price or the furnishing of services or facilities to any purchaser * * * was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Count II of the Federal Trade Commission's complaint in this case (J. A. 2-15¹) charged respondent

¹ "J. A." refers to the joint appendix in the court of appeals.

with violating Section 2 (e) of the Act.² Respondent manufactures and sells dress patterns which are used by women in making their own clothes (J. A. 32-33). It is one of the largest manufacturers and distributors of dress patterns in the United States, and distributes its patterns through retail stores (J. A. 33). Among respondent's larger customers are so-called "five and ten cent" chain stores, and among its smaller customers are so-called "fabric" or "yard goods" shops (*ibid.*). The complaint charged that respondent had furnished its larger customers with services and facilities not accorded to all purchasers on proportionally equal terms, because it had provided the five and ten cent stores with catalogs (which are "necessary to the proper storage and ready access for sale of patterns") and cabinets (which are "essential to a proper display of this promotional material and its ready access to the retail customer") (J. A. 10-11) free of charge, whereas its smaller fabric stores were required, at considerable expense, to buy or rent from respondent the identical or similar facilities (J. A. 10-11).

Respondent's answer, *inter alia*, denied that the five and ten cent stores were in competition with the fabric stores (J. A. 22), or "that the effect of any such practices have the requisite statutory effect on competition provided for in said Act" (J. A. 23); and alleged that "the value of any service or facility furnished to any one customer or group of customers and not

² Count I, which charged respondent with violating Section 5 of the Federal Trade Commission Act, was dismissed by the Commission for failure of proof (J. A. 34-36).

furnished to other customers" merely reflected "differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which its products are sold to its customers" (J. A. 22).

After full administrative proceedings, the Commission held that respondent had violated Section 2 (e) as charged, and entered a cease-and-desist order (J. A. 23-37). The Commission ruled that the five and ten cent stores and the smaller independent stores "are in competition in the sale of respondent's patterns" (J. A. 36); that it is unnecessary to show, as part of a prima facie case under Section 2 (e) of the Act, that the discriminations may injure competition (J. A. 27-28); and "that 2 (e) should [not] be read * * * so as to permit the introduction of evidence relating to cost justification which is provided for in 2 (a)" (J. A. 36).

By a divided court, the Court of Appeals for the District of Columbia Circuit reversed the Commission's order and remanded the case to the Commission for further proceedings. A majority of the court (Judges Danaher and Washington) agreed with the Commission that no proof "of competitive injury * * * was required to establish a prima facie case" and that "Injury to competition is not suggested as an element of a § 2 (e) violation" (*infra*, p. 22).³ A different majority (Judges Danaher and Burger),

³ Judge Burger, however, noted "his conviction that Congress intended not to create an un rebuttable presumption but sought actually to prohibit only such discrimination as produced a competitive injury * * *" (*infra*, p. 28, note 13).

however, held that the Commission had erred in refusing to receive evidence relating to respondent's cost justification defense.

Writing for this majority, Judge Danaher first rejected respondent's contention that the "justification" which Section 2 (b) permits to be "affirmatively shown" to a charge of discrimination "reaches so far as to import § 2 (a) criteria as matters of defense to a Section 2 (e) charge" (*infra*, p. 27). He pointed out (*ibid.*) that Section 2 (a) "makes no reference whatever to 'services or facilities furnished.'" The court further held, however, that "'cost justification' [in terms of respondent's "costs of sale and delivery as related to the differing methods of sale and distribution by the two groups that the facilities were so provided"] under the circumstances here may affirmatively be shown in order to dispel the charge of unlawful discrimination" (*infra*, pp. 27-28). The court stated (*infra*, p. 28) that Congress "must have intended that the justification to be shown under the first clause of § 2 (b) as to a § 2 (e) charge of discrimination in 'facilities furnished' to various customers, was to depend upon the facts in a particular case," and that since the Act "proscribes only such discrimination as is inimical to the public interest," respondent is entitled under the justification clause of Section 2 (b) to go forward with proof of "a cost justification * * * which dispels the complaint of such discrimination" (*infra*, p. 31). It stated (*infra*, p. 32) that, on the remanded proceedings, respondent "may offer such evidence [of cost justification] as may establish the fact that *unlawful* discrimination in favor of one

group as against another group of customers was not worked in any of the ways comprehended within § 2 (e)."

Judge Washington, dissenting, was of the view that the cost justification defense is "available in a case brought under Section 2 (a), but not in one brought under Section 2 (e)" (*infra*, p. 34). He stated (*infra*, p. 33, footnotes omitted) that it "is firmly grounded in the decisions" that "[t]he 'justification' referred to in Section 2 (b) must be that described in the meeting-competition proviso to that section, or such justification as may be spelled out from the provisions of the particular section—other than Section 2 (b)—creating the offense alleged." He urged (*id.*, pp. 33-34) that, since the 2 (b) proviso was here inapplicable, the only justification permitted under Section 2 (e) is "a showing by the seller that * * * the facilities furnished were accorded to all purchasers on proportionally equal terms."

REASONS FOR GRANTING THE WRIT

In holding that cost justification may be shown as a defense to a charge of discrimination in furnishing services or facilities under Section 2 (e) of the Robinson-Patman Act, the court below has decided an important question of federal law, not yet settled by this Court, contrary to the principles which other courts of appeals have applied in construing that section and the related provisions of Sections 2 (c) and 2 (d) of the Act.

The only section in the Act expressly providing for a defense of cost justification is Section 2 (a) (deal-

ing with discrimination in price). Prior to the decision below, it was well settled that this and other provisions of Section 2 (a) were not to be read into either Section 2 (e), or the related provisions of Section 2 (c) (dealing with brokerage payments) or Section 2 (d) (dealing with payment of allowances).^{*} In short, all four subsections—(a), (c), (d), and (e)—were construed to be independent of each other in this respect. /

Thus, in *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667 (C. A. 3), certiorari denied, 308 U. S. 625, the court held that the Commission properly had refused to permit a cost-justification defense to be introduced in a 2 (c) case involving the receipt of illegal brokerage. The court stated (p. 677) that, while Section 2 (a) "deals with discriminations in price generally," 2 (c) "deals in particular with a trade practice which has frequently resulted in price discriminations and unfair competition," and that "[t]o read the words of paragraph (a) into paragraph (c) destroys the Congressional intent." Similarly, although Section 2 (a) prohibits only those discriminations in price which may result in injury in competition, such competitive injury need

^{*} Section 2 (c) prohibits the payment or receipt of any brokerage, or allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise. Section 2 (d) prohibits payments to a customer for services or facilities furnished by or through such customer in connection with the distribution of any products or commodities, unless such payments are available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

not be shown to establish an illegal discrimination in services and facilities in violation of Section 2 (e) (*Elizabeth Arden, Inc. v. Federal Trade Commission*, 156 F. 2d 132, 135 (C. A. 2), certiorari denied, 331 U. S. 806; *Corn Products Refining Co. v. Federal Trade Commission*, 144 F. 2d 211, 219 (C. A. 7), affirmed, 324 U. S. 726), or illegal commissions or brokerage fees in violation of Section 2 (c) (*Biddle Purchasing Co. v. Federal Trade Commission*, 96 F. 2d 687, 690 (C. A. 2), certiorari denied, 305 U. S. 634; *Oliver Bros., Inc. v. Federal Trade Commission*, 102 F. 2d 763, 766, 767 (C. A. 4); *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667, 676-677 (C. A. 3), certiorari denied, 308 U. S. 625; *Webb-Crawford Co. v. Federal Trade Commission*, 109 F. 2d 268, 269 (C. A. 5), certiorari denied, 310 U. S. 638; cf. *Southgate Brokerage Co. v. Federal Trade Commission*, 150 F. 2d 607, 609-610 (C. A. 4), certiorari denied, 326 U. S. 774). Indeed, the court below recognized the controlling force of these decisions, for it sustained the Commission's ruling that competitive injury was not an element of a Section 2 (e) violation.

In the *Oliver Bros.* case, *supra*, Chief Judge Parker pointed out (p. 767, emphasis added) that the "three specific matters" condemned as unfair trade practices by subsections (c), (d), and (e)

were forbidden because of their tendency to lessen competition and create monopoly, without regard to their effect in a particular case; and there is no reason to read into the sections forbidding them the limitations contained in section 2 (a) having relation to price discrimination, which is an extremely difficult matter

to deal with and is condemned as unfair only in those cases where it has an effect in suppressing competition or in tending to create monopoly. The forbidding of specific practices because of their tendency toward a general result, also forbidden, is familiar legislative practice; and *no reason suggests itself why the limitations and provisions relating to one should be read into those relating to the other.* [Emphasis added.]

This statement was quoted with approval by Chief Judge Biggs in the *Great Atlantic & Pacific Tea Co.* case, *supra*.

Similar reasoning, we believe, supports the conclusion that the cost justification defense of Section 2 (a) is not to be read into Section 2 (e). The provision in Section 2 (b) which permits a respondent, upon proof of a discrimination in prices, services or facilities, to show "justification," does not create any new substantive defense, but merely "attempts to lay down the rules of evidence under the Act" (*Automatic Canteen Co. v. Federal Trade Commission*, 346 U. S. 61, 75). Since the only "justification" which Section 2 (b) itself provides is a showing that a discrimination in prices or in services or facilities "was made in good faith to meet an equally low price of * * * or the services or facilities furnished by a competitor," any other "justification" must, as Judge Washington stated in his dissenting opinion, "be spelled out from the provisions of the particular sections—other than Section 2 (b)—creating the offense alleged."*

* As originally drafted, Section 2 (b) applied solely to "discrimination in price." The references to "services or facilities"

There is nothing in Section 2 (e), flatly prohibiting discrimination in favor of particular customers by giving them services or facilities not available to all purchasers on proportionately equal terms, which even suggests that such discrimination may be cost justified. On the contrary, since the cost justification provision appears only in the section dealing with price discrimination, whereas the meeting competition defense is expressly applicable both to discrimination in price and discrimination in services and facilities, the plain inference is that cost justification is *not* a defense in cases involving discrimination in services and facilities. As Judge Frank stated in the *Elizabeth Arden* case, *supra*, "We see no reason why the limitations contained in (a), or their equivalent, should be read into (e)." 156 F. 2d at 135. See also *Oliver Bros.* case, *supra*.

This view also is supported by the legislative history of Section 2 (e). It shows that Congress sought to eliminate the evil of sellers granting "special allowances" to "large buyer customers" by "prohibiting

were inserted on the floor of the House after the following explanation was made on behalf of the House Judiciary Committee by Congressman McLaughlin (80 Cong. Rec. 8225 (1936)):

Mr. Chairman, this is a committee amendment agreed to unanimously by the committee, and was explained yesterday. It simply allows a seller to meet not only competition in price of other competitors but also competition in services and facilities furnished.

The legislative history gives no indication that Section 2 (b) was designed to permit a seller charged with violating 2 (e) to show cost justification.

the granting of such allowances, either in the form of services or facilities themselves furnished by the seller to the buyer, or in the form of payment for such services or facilities when undertaken by the buyer, except when accorded or made available to all competing customers on proportionally equal terms." H. Rep. 2287, 74th Cong., 2d sess., pp. 15-16. To permit an additional exception for such allowances which are cost justified would substantially weaken the protection which Congress endeavored to provide for small buyers against "oppressive discriminations" (*ibid.*). To permit the additional exception, moreover, would greatly lengthen the administrative proceedings in Section 2 (e) cases.

Nor can it be said to be anomalous to permit cost justification as a defense in a price discrimination case, but not in one involving discriminations in services and facilities. As Chief Judge Parker noted in the *Oliver* case, *supra*, "The forbidding of specific practices because of their tendency toward a general result, also forbidden, is familiar legislative practice." Moreover, Congress reasonably could have concluded that the character of discriminations in services and facilities may make it so difficult to determine whether they are cost justified* that they should be prohibited completely unless the services and facilities are made available to all purchasers on proportionally equal terms.

* Such determinations may involve such difficult questions as the cost of rendering such services, their value to the recipient, and their value (on a "proportional" basis) to the customers being discriminated against.

The basic holding of the court below—that cost justification is a defense in 2 (e) proceedings—is a significant one in the administration of the Robinson-Patman Act. Particularly is this so in view of the court's suggestion that the Commission in such cases is required to determine whether, "upon the facts in a particular case," the discrimination there shown is "inimical to the public interest" (*infra*, pp. 28, 31). But Section 2 (e) does not provide for such a general public interest evaluation in each case; subject only to the 2 (b) "meeting competition" proviso, Section 2 (e) flatly prohibits all discriminations resulting from failure to furnish services and facilities to all customers "on proportionally equal terms." If any additional exceptions are to be established, it should be done by Congress, and not by the courts.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,

Solicitor General.

VICTOR R. HANSEN,

Assistant Attorney General.

DANIEL M. FRIEDMAN,

Attorney.

EARL W. KINTNER,

General Counsel,

JAMES E. CORKEY,

ALVIN L. BERMAN,

Assistant General Counsel,

Federal Trade Commission.

SEPTEMBER 1958.

APPENDIX A

In the United States Court of Appeals for the
District of Columbia Circuit

No. 13884

SIMPLICITY PATTERN CO., INC., A CORPORATION,
PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION FOR REVIEW OF ORDER OF THE
FEDERAL TRADE COMMISSION

Decided May 29, 1958

Mr. William Simon for petitioner. *Mr. Harold F. Baker* also entered an appearance for petitioner.

Mr. Alvin L. Berman, Attorney, Federal Trade Commission, with whom *Mr. James E. Corkey*, Assistant General Counsel, Federal Trade Commission, was on the brief, for respondent.

Before WASHINGTON, DANAHER and BURGER, *Circuit Judges*

DANAHER, *Circuit Judge*: Simplicity Pattern Co., Inc., petitioner herein, is engaged in the manufacture and sale of patterns widely purchased by women customers intent upon making their own garments. The case does not involve Simplicity's competitors in the pattern field, but discrimination favoring one group of customers by the furnishing of facilities not made available to other customers on proportionally equal terms. Simplicity asks us to review and set aside the

Commission's order of March 13, 1957, that petitioner cease and desist from:

"Contracting to furnish or furnishing to any of respondent's customers counter catalogs, cabinets or other equipment or facilities connected with the handling, sale or offering for sale of respondent's patterns, unless such catalogs, cabinets or other equipment or facilities are available on proportionally equal terms to all customers competing with such favored customers in the sale of respondent's patterns."

The Commission's complaint had contained two counts, Count I brought under §5 of the Federal Trade Commission Act¹ charging that petitioner had extended to larger customers, certain chain stores (hereinafter sometimes referred to as "Red Fronts"), a "standing debit" under which such customers did not pay for their initial inventory of stock, a short term contract, and prepaid transportation. Such bases for doing business had not been extended to smaller customers, particularly certain retailers (hereinafter sometimes referred to as "fabric stores"). Concluding that the record lacked substantial evidence to warrant a finding of injury to competition, the examiner dismissed Count I. Counsel supporting the complaint appealed, but the Commission affirmed, concluding that adverse competitive effect upon Simplicity's competitors or among its customers had not been established. Count I, thus, is not before us.

Count II alleged violation of subsection 2 (c) of the Clayton Act, as amended,² in that the petitioner had

¹ 52 Stat. 111 (1938), 15 U. S. C. § 45 (1952).

² 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U. S. C. § 13 (c) (1952). The subsection in pertinent part here said to be applicable reads: "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a

supplied to its larger customers, the Red Fronts, free monthly counter catalogues and certain storage cabinets, while the small customers such as the fabric shops had been required to pay for the same or similar items. The examiner concluded that the practices denounced in Count II violate § 2 (e). Simplicity appealed, but the Commission affirmed, adopting the findings, conclusions and the order contained in the initial decision.

The Commission's opinion recited Simplicity's contention that there is no meaningful competition between the larger stores, the "Red Fronts," and the smaller independents, the "fabric shops," since the Red Fronts sell patterns for a profit while the fabric shops do not intend to make a profit. Rather they sell Simplicity's patterns as a necessary incident to their sale of fabrics. The opinion then runs on:

"* * * Considering the circumstances appearing in the record, this argument is not wholly without merit, but we agree with the examiner's conclusion that the two kinds of stores are in competition in the sale of respondent's patterns. An element of rivalry exists in spite of the fact that the fabric shops sell the product primarily as an accommodation. It appears that they may not profit dollarwise in the sale of patterns alone, but they recognize the value of such business for attracting customers who may purchase other goods. The two kinds of stores are vying for the same particular markets whatever their motives may be. In our opinion this sufficiently discloses the presence of competition between them.

commodity bought for resale * * * by * * * furnishing * * * any services or facilities connected with the * * * sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

"[Simplicity] asserts, in addition, that the cabinets have no real relationship, as the statute provides, to the 'handling, sale, or offering for sale of such' patterns, and that dress patterns are not a commodity within the meaning of Section 2 (e). There appears to be no merit in either of these contentions or various other arguments made by [Simplicity], and each is rejected."

The Commission confirmed the examiner's conclusions. His findings, so far as pertinent to our review, we now paraphrase.

Simplicity, a New York corporation, is one of the largest manufacturers and distributors of dress patterns, with sales extending throughout the United States. Its patterns are sold to all customers, Red Fronts and fabric stores alike, at 60% of the labeled retail prices of 25¢, 35¢ and 50¢, and both groups of stores retail at those labeled prices.

Simplicity supplied to the Red Fronts, *free of charge*, monthly counter catalogues which depict Simplicity's patterns and are essential to the retail sale of patterns. Fabric stores were required to pay for such catalogues a price of \$1.65 to \$2 each, depending upon the binding.

Simplicity furnished to the Red Fronts, *free of charge*, cabinets and other equipment while fabric stores were required to purchase or rent such equipment.

Red Fronts merchandised the patterns as they do any other item, and unless the patterns can show a profit, the Red Fronts will not handle them. A prospective retail purchaser may examine a catalogue in a small space on the counter beneath which, in a cabinet, the patterns are stored. On the other hand, the fabric stores usually made no profit on the sale of patterns and did not expect to do so. The fabric

stores handled the patterns to promote the sale of fabrics and because the customers expected this service. "The patterns, catalog, fashion previews and other advertising material are prominently displayed and the customer is invited to sit and browse through the material, all in order to promote fabric sales," the examiner found.

He concluded, despite the differences in sales methods, that the two groups of stores compete in the sale of patterns. "It is difficult to say that two stores in the same shopping area, possibly side by side, are not in competition when^o they are selling the same article at the same price to essentially the same segment of the public * * *."

"* * * The catalogs supplied the two groups of stores are identical. While the cabinets differ materially in design and appearance, the fact remains that they serve essentially the same purpose—as a storage place for the patterns pending their sale to the public.

"True, there is no showing of competitive injury. But this, as the examiner understands, is not required in a proceeding under Section 2 (e). Given the element of jurisdiction, it appears that a prima facie case is established when it is shown that a seller is supplying to one customer facilities for use in the resale of the seller's products, and not supplying such facilities to the competitor of the favored customer on proportionally equal terms. In short, Section 2 (e) appears to be a per se statute, requiring no proof of competitive injury." (Emphasis supplied.)

* As to Count I, the examiner had noted, "The record seems clearly to be without any substantial evidence warranting a finding of injury to competition," as between the Red Fronts and the fabric stores. The Government had already conceded before the examiner that no competitive injury had been

Part I

We agree that, for the purpose of establishing a prima facie case, there was discrimination favoring the Red Fronts, since there is substantial support in the record as a whole that Simplicity furnished to their catalogues and cabinets free of charge while the fabric shops were required to buy or rent the identical or similar facilities.

"Petitioners thus furnished a service connected with the sale or offering for sale of a commodity upon terms not accorded to other purchasers. * * * *It is enough if the discrimination be made in favor of one who is a purchaser and denied to another purchaser or other purchasers of the commodity.*"⁴ (Emphasis supplied.)

We agree that the Red Fronts and the fabric stores, operating in the same cities and in the same shopping area, often side by side, were competitors, purchasing from Simplicity at the same price and then at like prices retailing the identical product to substantially the same segment of the public.⁵ Simplicity would have us say, despite such facts, there was no

shown as to pattern makers and manufacturers competing with Simplicity. As to Count II, we will demonstrate first our agreement that a prima facie case was made out. But the Examiner's understanding of the effect of such proof failed to give effect to Section 2 (b), the first clause of which, applicable here, expressly permits proof of "justification," *infra*, Part II.

⁴ Corn Products Co. v. Comm'n, 324 U. S. 726, 744 (1945).

⁵ Elizabeth Arden, Inc. v. Federal Trade Commission, 156 F. 2d 132 (2 Cir. 1946), *cert. denied*, 331 U. S. 806 (1947); Elizabeth Arden Sales Corporation v. Gus Blass Co., 150 F. 2d 988 (8 Cir. 1945), *cert. denied*, 326 U. S. 773 (1945).

competition here. It points to the Commission's observation, *supra*, that its argument "was not wholly without merit." Simplicity contends the Red Fronts must sell patterns at a profit while the fabric stores seek none from their sale of patterns. Their profit comes from the sale of fabrics, and they merchandise the patterns simply as a matter of service and for customer convenience. We have no doubt a pattern purchaser in a Red Front may there purchase needles, thread, thimbles, shears, tape measures and what not, each item yielding its mark-up to supplement the profit derived from the pattern sale. But both groups of stores were selling patterns. Simplicity chose to pioneer sales through Red Fronts. It decided it was good business to provide, free of charge, catalogues and cabinets which facilitate pattern sales in Red Front pattern stores. Fabric stores, however, not only are not shown to have been accorded like facilities on proportionately equal terms but to be required to bear a very considerable expense, either to buy or rent comparable facilities. We may assume that had the facilities been available to the fabric stores on "proportionally" equal terms, there could be no discrimination within the meaning of the section. Section 2 (e), as invoked here, subject to § 2 (b) to which we will soon refer, simply proscribes as unlawful the discrimination here complained of. It says nothing about the methods to be employed in the resale of the commodity. It is silent as to the motives which actuate the "purchaser" in his handling of the product involved. But both groups sold the same article to the same type of buyer in the same shopping area. We have no doubt they are thus competitors, but whether or no, as "purchasers" from Simplicity, they come within § 2 (e) in the context here applied.

We agree that there was no showing of competitive injury, and that no such proof was required^{*} to establish a prima facie case. Injury to competition is not suggested as an element of a § 2 (e) violation. Even though absence of competitive injury was here found, that fact is immaterial to the point we here discuss. Section 2 (e) was written for the promotion of fair dealing among the customers of a seller. It was intended to protect purchasers against such discrimination as might arise from unequal and *unjustified* furnishing of services or facilities to be employed in marketing the seller's goods. It would seem obvious, we might say in passing, regardless of a lack of competitive injury, Red Fronts for each \$1,000 of sales received a mark-up of \$400, while fabric stores received per \$1,000 of sales, \$400 less the cost of cabinets and catalogues. Competitive *opportunities* might at least seem disparate.⁷

Thus, without more, on the facts so far treated, a "prima facie case" within the meaning of § 2 (b) may be made out which comes squarely within the interdiction of § 2 (e). But Congress has said, in effect, having in mind the purposes of the Robinson-Patman Act, there may be discrimination such as has been discussed—*unless justification can be shown*. Congress has not enacted § 2 (e) in isolation—the interdiction does not stand alone. Accordingly, while

^{*} "The statute is aimed at discrimination by supplying facilities or services to a purchaser not accorded to others * * *." *Corn Products Co. v. Comm'n*, *supra* note 4; *Corn Products Refining Co. v. Federal Trade Comm'n*, 144 F. 2d 211, 219 (7 Cir. 1944); *Elizabeth Arden, Inc. v. Federal Trade Commission*, *supra* note 5, 156 F. 2d at 135.

⁷ Cf. *Trade Comm'n v. Morton Salt Co.*, 334 U. S. 37, 46 (1948), a § 2 (a) case to be sure, which nevertheless reflects the spirit of the legislation.

a prima facie § 2 (e) case may be developed even without a showing of competitive injury, Congress clearly contemplated situations might arise for which justification may exist. It specifically provided for such an exigency in § 2 (b) which, in pertinent part, reads:

“(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in * * * facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing [herein] contained * * * shall prevent a seller rebutting the prima facie case thus made by showing that his * * * furnishing of * * * facilities to any purchaser or purchasers was made in good faith to meet * * * the * * * facilities furnished by a competitor.”

We see from the first clause that when a prima facie case has been made of discrimination attributable to the *furnishing of facilities*, an order terminating the discrimination may be issued “unless justification shall be affirmatively shown” by the seller. Whether *customers* or *competitors* are involved as to the first portion of § 2 (b) clearly that justification must be a *legal* justification, one which dispels that unlawfulness which the purpose of the Act and the public interest require to be suppressed. Then, it is further spelled out in the proviso that if a *competitor* shall *lawfully* furnish facilities, a seller may rebut a charge of discrimination by showing he has furnished facilities in a good faith effort to provide like facilities. This must be so, for neither the Commission nor the courts could countenance the unlawful furnishing of

facilities by one charged under § 2 (e) in order to meet like *unlawful conduct* of a competitor.⁹ Section 2 (b), then, provides for rebuttal of a *prima facie* case of discrimination when charged to have been practiced among a seller's *customers*, as in a § 2 (e) case, and in special circumstances as noted, where the seller's *competitors* are involved. While a complete § 2 (e) case may be made out which, without more and unrebutted, constitutes a "per se" case, as the examiner put it, the alleged violator under § 2 (b) may go forward and establish "justification." If he affirmatively sustains his burden, there no longer is unlawful discrimination.

Part II

Here Simplicity sought and procured a ruling that no evidence of "cost justification" could have any effect on the examiner. The latter had already concluded, in effect, that the per se violation, established as he found, was impervious to any such defense. He thus reflected the position of the Commission as put in its brief, that "Congress has already determined that the practice covered by Section 2 (e) has the tendency and capacity to injure competition, and injury to competition is not a matter to be litigated in any particular case, either as a part of the case in chief, or as a matter of rebuttal."¹⁰ In effect we are told if "discrimination" arises under § 2 (e), a finding of violation automatically must follow. We are at a

⁹ Cf. *Elizabeth Arden Sales Corporation v. Gus Blass Co.*, *supra* note 5, 150 F.2d at 995, 996. The proviso portion of § 2 (b) is not here involved, it may be observed in passing.

¹⁰ The Commission relies upon § 2 (c) cases which have no bearing whatever upon our problem. Sec. 2 (b) specifically provides for rebuttal by way of justification where the alleged discrimination among *customers* arises from the furnishing of facilities. No such provision is related to § 2 (c) violations. Cf. *Oliver Bros. v. Federal Trade Commission*, 102 F.2d 763 (4 Cir. 1939); *Webb-Crawford Co. v. Federal Trade*

loss to reconcile this claim with the provisions of § 2 (b) expressly outlining the procedures which permit rebuttal by way of "justification" and establish the burden of proof. Indeed, the Commission actually argues to us in its brief that the rebuttal proviso of § 2 (b) authorizing a good faith meeting of facilities furnished by a competitor is "obviously" the "matter of rebuttal which is referred to in the first portion of Section 2 (b)." The Commission would have us eliminate the first clause, and, in effect, would thus read § 2 (b) out of the case. We find this position to be completely erroneous for the reasons we have suggested. The error undoubtedly underlay the examiner's conclusion as to the preclusive status he ascribed to the "per se" case which in truth was no more than the prima facie case under § 2 (e) to which the pertinent portions of § 2 (b), as a whole, were expressly related.

The Commission has asked that we not consider this clear error on the ground that the point had not been saved of record. Had Simplicity not raised the "cost justification" issue, we agree we would be so precluded and we have repeatedly so held.¹⁰

From the very outset, and persistently asserted throughout the proceedings, was Simplicity's claim that "cost justification" was available as a defense. The point was not only briefed and argued by both sides, but was passed upon by the Commission. Peti-

Commission, 109 F. 2d 268 (5 Cir. 1940), *cert. denied*, 310 U. S. 638 (1940).

¹⁰ See, e. g., *Barclay Home Products, Inc. v. Federal Trade Commission*, 100 U. S. App. D. C. 46, 241 F. 2d 451 (D. C. Cir. 1957), *cert. denied*, 354 U. S. 942 (1957); *Albertson v. Federal Communications Commission*, 100 U. S. App. D. C. 103, 106, 243 F. 2d 209, 212 (D. C. Cir. 1957), and cases cited in both.

tioner's answer to the original complaint, in pertinent part read:

"* * * Respondent denies that the value of any service or facility furnished to any one customer or group of customers and not furnished to other customers exceeds the difference in the costs of manufacture, sale, or delivery resulting from the differing methods or quantities in which such products are sold, distributed, or delivered to such respective customers."

Following oral argument on Simplicity's motion to dismiss which the examiner granted as to Count I and denied as to Count II, he set a conference for the simplification of issues. The transcript of proceedings then held, made part of the record, showed an announcement by the examiner that "my views are definite and my thought at the present time is that cost justification in a case of this kind is not available as a defense." An excerpted colloquy is revealing.¹¹ We are satisfied that the point is properly before us.¹²

¹¹ "Mr. SIMON. Judge, do I understand that if evidence were offered and Mr. Smith would not object and it would be received in evidence on cost justification, that you would still not hold it was a defense to an answer under 2 (e)?"

"Hearing Examiner PACK. Yes, sir. That is correct. I don't understand that the failure to object would affect the law in any way and if the evidence should be received, and if I should continue to entertain the views which I now hold, it seems to me the evidence would simply have to be disregarded in the decision of the case. I do not understand that reception of the evidence into the record, even without objection, would make any difference insofar as the law is concerned."

"Mr. SIMON. For the purpose of this record, Judge, may the record show that you would hold that it was not a defense to an action under 2 (e)?"

"Hearing Examiner PACK. Yes, sir."

¹² Of course a proffer ordinarily is contemplated by the Commission's rules, 16 C. F. R. 3.15 (c) (3) (Supp. 1956). Here,

The Act has not defined "justification," as used in § 2 (b), where, as we have observed, the first clause permits justification to be "affirmatively shown" when the discrimination charged involves, as here, the furnishing of facilities to *customers*. We do not agree with petitioner that such justification reaches so far as to import § 2 (a) criteria as matters of defense to a Section 2 (e) charge. Section 2 (a) makes no reference whatever to "services or facilities furnished."

Conversely, it seems equally clear that the "proportionally equal terms" reference in § 2 (e) is not a complete answer, for there *could* be no discrimination, having in mind the purposes of the Act, if all buyers of goods for resale may obtain services or facilities connected therewith on "proportionally equal terms." We understand Simplicity to be entitled to undertake to prove in terms of its costs of sale and delivery as related to the differing methods of sale and distri-

where the examiner and the Commission itself had equated the establishment of a *prima facie* case with a conclusive determination of violation, it would seem to have been futile to have taken the time and to have incurred the expense of establishing cost justification where the point was deemed foreclosed. In any event, briefed and argued as it was, the point was fully before the Commission and the purpose of the rule was met. If it could be said under the circumstances that there was a failure of compliance with the rule, the Commission seems to have waived it. Its opinion recites:

"Respondent argues principally that 2 (e) should be read in conjunction with other subsections of Section 2 so as to permit the introduction of evidence relating to cost justification which is provided for in 2 (a). We cannot concur in this argument. 'Congress validly made the decision that conduct coming within the more definite standard of (e) was unlawful. We see no reason why the limitations contained in (a), or their equivalent, should be read into (e).' *Elizabeth Arden, Inc., et al. v. Federal Trade Commission*, 156 F. 2d 132."

bution by the two groups that the facilities were so provided, with § 2 (e) in mind, that "cost justification" under the circumstances here may affirmatively be shown in order to dispel the charge of unlawful discrimination. In short, we look to § 2 (b) as affording two separate and distinct grounds upon which "justification" may rest, one, such as was considered in *Elizabeth Arden v. F. T. C.*, *supra* note 5, arising under the § 2 (b) proviso, and another such as may be developed here under the first clause of § 2 (b). In the § 2 (b) proviso situation presented in the *Elizabeth Arden* case, the court's recital noted at page 133 that the seller was out "to beat and not to meet" its competitors. Here no competitors are involved, but only a claim of discrimination as between the two classes of customers. Congress certainly never wrote § 2 (b) with its varying facets only to have the entire section conditioned to situations arising under the proviso. Congress, we think, must have intended that the justification to be shown under the first clause of § 2 (b) as to a § 2 (e) charge of discrimination in "facilities furnished" to various customers, was to depend upon the facts in a particular case. That the term may include a "cost justification" which Simplicity desired to establish seems clear enough.¹³

¹³ Judge Burger has authorized me to note his conviction that Congress intended not to create an un rebuttable presumption but sought actually to prohibit only such discrimination as produced a competitive injury, and certainly never intended to bar discrimination which might have a beneficial effect as promoting sales by and among competitors. He points to two sources to demonstrate the basis for his more comprehensive view, viz: (a) American Law Institute, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT (1953) at 114-115: "There seems to be little logic in making disproportionate but bona fide allowances or services to competing purchasers (which may not amount to a discrimination

Here the catalogues were apparently identical. The cabinets, while designed to contain patterns for ready reference, were markedly different. The Red Fronts sold patterns at a counter space, some 14 by 14 inches, just large enough to place a catalogue on the counter. The patterns were stored in cabinets or boxes under the counter. But the fabric stores desired "rather expensive, well appearing, nice looking articles of furniture [which] compare probably to a fairly expensive filing cabinet in the office of a lawyer or businessman," the examiner noted. These, we take it, coincide with the fabric stores' management's desire to exploit their sale of fabrics. Their purchase of good-looking furniture, a cabinet costing \$150, "made to appear attractive," might well be related to the creation of a business environment conducive to ultimate sales of the goods on which their profit depended.¹⁴ Simplicity had some 6,000 customers who

in price) create, in effect, a conclusive presumption of injurious effect upon competition, whereas the charge of different prices to competing purchasers is only prima facie evidence of such injury"; (b) REPORT OF THE ATTORNEY GENERAL'S NAT'L COMMITTEE TO STUDY THE ANTITRUST LAWS (1955) at 191-2: "[T]he Committee disapproves the present disparity in the statutory consequences which attach to economically equivalent business practices. * * * Antitrust enforcement should not be complicated by diverse legal consequences solely dependent on whether a discriminatory concession masquerades as * * * 'allowance', or 'service' rather than a naked quotation in price. For, as the Supreme Court has recognized, in any reasonable implementation of antitrust objectives 'the crucial fact is the impact of the particular practice on competition, not the label it carries.'" (Emphasis added.) Cf. *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F. 2d 1 (7th Cir. 1949), cert. denied, 338 U. S. 948 (1950).

¹⁴ Simplicity's brief before the Commission noted: "Display is an element in this effort and, generally, three or more superior

purchased patterns in an amount less than \$400 per year and who were serviced at a loss. Overall, 82% of Simplicity's 12,300 customers, as fabric stores, accounted for only 30% of its total dollar volume of sales, while Red Fronts operated some 3,200 separate outlets. One of the six witnesses had pattern sales of \$178 per year. The cost of catalogues and cabinets may have seemed of scant moment to fabric store operators who obtained their real profit from fabric sales. As the examiner said: "They emphasize that they handle patterns only to sell fabrics and because their customers expect the service. None of these witnesses regards the competition of the 10¢ stores in the sale of patterns as of any real consequence."

It seems clear that the examiner felt bound by his understanding that § 2 (e) constituted a per se statute where violation automatically followed from proof that the furnishing of facilities to one group was discriminatory if another group, to serve its own ends, bought and paid for catalogues and cabinets. No evidence of "cost justification" for the different treatment, he said, could rebut his conclusion which the Commission seems to have shared. We are satisfied

quality pattern cabinets were prominently displayed. Usually these were 4-drawer, all steel, cabinets with roller bearing drawers—somewhat like modern office filing cabinets—with simulated mahogany and light colored wood finishes." The record does not show whether or not these cabinets, apparently adapted to the orderly filing of various types of patterns, frequently changing, were purchased to satisfy the particular decor of the fabric store customer, nor whether or not Simplicity sold them at cost as a matter of service to fabric store customers. Simplicity insisted that it could not be expected "to furnish free cabinets, costing several hundred dollars, to a prospective smaller customer on whose business it could not expect to earn that profit during many years." It argued that such differences in treatment as might exist "could well have been cost justified had the Examiner permitted Simplicity to do so."

that the Act proscribes only such discrimination as is inimical to the public interest. If a cost justification can be shown which dispels the complaint of such discrimination, Simplicity is entitled under the first clause of § 2 (b) to go forward with such proof.

Of course the burden of proof of justification rests upon Simplicity,¹⁵ but § 2 (b), "infelicitous language"¹⁶ or not, certainly applies to a § 2 (e), proceeding. Congress recognized that not *every* case of seeming discrimination is barred, just as § 2 (f) "does not reach all cases of buyer receipt of a prohibited discrimination in prices."¹⁷ In the *Automatic Canteen* case, the Court rejected the Commission's claims as to the effect of § 2 (b), and observed that considerations of fairness and convenience must be regarded as controlling.¹⁸ Perhaps it is not without significance that the Commission had not here sought to make a § 2 (f) case against the Red Fronts. Here, it will be remembered, the wholesale prices of the patterns to the two groups were identical, just as were the retail prices to the public. We are bound to conclude, as we see this record, that the seller's costs may have an important bearing on the business practices alleged to have been discriminatory.

Here the Commission as a practical fact would have us bar all evidence of cost justification, whatever it may be. We think the Court in its reading of the

¹⁵ *Automatic Canteen Co. v. F. T. C.*, 346 U. S. 61, 77 (1953); *Trade Comm'n v. Morton Salt Co.*, 334 U. S. 37 (1948).

¹⁶ Cf. *Automatic Canteen Co. v. F. T. C.*, *supra* note 15, 346 U. S. at 78. The Court of Appeals had read the "apparently careful choice of language" as not "meaningless." See, *idem*, 194 F. 2d 433, 438 (7 Cir. 1952).

¹⁷ *Id.* at 71.

¹⁸ 346 U. S. at 78; and see the Court's note 17, *Id.*, at 75, "a reference to § 2 (b) is to the procedural language preceding the proviso," and discussion at 76 and 77.

Act has pointed the way.¹⁹ We conclude that Simplicity should be entitled, affirmatively within the meaning of § 2 (b), to demonstrate "cost justification." To that end it may offer such evidence as may establish the fact that *unlawful* discrimination in favor of one group as against another group of customers was not worked in any of the ways comprehended within § 2 (e).²⁰ We assume the Commission in its consideration of the problem will regard the pur-

¹⁹ Essential fairness is the keynote, 346 U. S. at 78-81.

²⁰ Oral argument yielded no adequately explanatory answer to our question based upon a not entirely hypothetical case: can it be said as a matter of law that § 2 (e) reaches as discriminatory, the rental or sale of vending machines to an industrial group which pays an appropriate charge therefor, while a drug store chain would refuse the machines even if furnished gratis? We took as illustrative an interstate purveyor of foodstuffs, coffee and soft drinks which are sold, wholesale, at identical prices per item, to industrial establishments, gasoline stations, on the one hand, and to a chain of drug stores on the other. The latter desires no vending machine clientele, it wants counter customers who while in the "drug" store, also may buy other goods, cameras, summer chairs, cutlery and what not. The profits from such sales make up for "loss leader" counter business, and the drug chain is free from the necessity of maintaining kitchens to prepare and trucks to distribute the foods and beverages. The industrial group wants to serve its patrons and to keep its employees on the job not leaving the premises for a coffee break. The purveyor could not have met the costs of providing vending machines for the gas stations except for its large volume sales to the drug chain. The charges to the consuming public are the same in each case.

The purveyor is interested in selling its foodstuffs and beverages. Its costs in making available the vending machines, with whatever capital is locked up in the venture, are an expense involved in its doing business, in meeting the particular and peculiar demands of two types of customers for its goods, one group which desires a facility of a particular type, and another which will not have the facility under any circumstances. Both classes of customers, at prices both are willing

poses of the Act and the public interest criteria which should guide its thinking. To that end we set aside the Commission's order and remand this case.

WASHINGTON, *Circuit Judge, dissenting*: The disposition of this case turns on the meaning to be given to Section 2 (b) of the Clayton Act, as amended. That section permits one against whom a prima facie case is made to show "justification" for his conduct. But that expression is not left undefined. Far from being all-inclusive, it in fact covers rather narrow ground. The "justification" referred to in Section 2 (b) must be that described in the meeting-competition proviso to that section,¹ or such justification as may be spelled out from the provisions of the particular section—other than Section 2 (b)—creating the offense alleged. This premise is firmly grounded in the decisions.² No one claims that the proviso in Section 2 (b) is applicable to the facts of the present case. Hence we look to Section 2 (c), the section governing here, which contemplates as justification for a prima facie violation of that section a showing

to pay, purchase from the purveyor precisely what they want, the foods and beverages they desire to resell. We find ourselves unable to perceive that the "discrimination" has the slightest meaningful resemblance to the purposes of the Act or to any evils it was designed to prevent.

¹ "Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

² See *Elizabeth Arden, Inc. v. Federal Trade Commission*, 156 F. 2d 132, 135 (2d Cir. 1946), *cert. denied*, 331 U. S. 806 (1947); *Oliver Bros., Inc. v. Federal Trade Commission*, 102 F. 2d 763, 767 (4th Cir. 1939); *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667, 675-77 (3d Cir. 1939), *cert. denied*, 308 U. S. 625 (1940).

by the seller that all purchasers were accorded facilities on "proportionally equal" terms. To repeat: Congress provided only two defenses to charges against one engaged in commerce of conduct which prima facie violates Section 2 (e): (1) under the proviso to Section 2 (b) that the facilities were furnished in good faith to meet the facilities furnished by a competitor; or (2) within the language of Section 2 (e) that in fact the facilities furnished were accorded to all purchasers on proportionally equal terms.

The Simplicity Company makes no contention that it has furnished cabinets and catalogs on proportionally equal terms to the Red Fronts and the fabric stores. Presumably if it afforded facilities on proportionally equal terms the Commission would not object. But Simplicity cannot refuse proportional equality and then argue that its refusal is justified by cost differentials—a defense available in a case brought under Section 2 (a), but not in one brought under Section 2 (e).

As a practical matter, "cost justification" in the present context can only mean that Simplicity may "justify" its actions by showing that many of its fabric store customers do not pay their bills, or are unprofitable to deal with because of small volume, or some similar reason. Such factors may explain Simplicity's desire to discriminate against them in favor of bigger and more profitable accounts, but I see no evidence that Congress has decreed that factors of that sort shall be viewed as legal justification. Quite the contrary, as I see it. In fact, Section 2 (e) of the Act becomes almost meaningless if such defenses are to be allowed to prevail.

I would therefore affirm the Commission's cease and desist order.

APPENDIX B

In the United States Court of Appeals for the
District of Columbia Circuit

No. 13,884—April Term, 1958

SIMPLICITY PATTERN Co., INC., A CORPORATION,
PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION FOR REVIEW OF ORDER OF THE FEDERAL TRADE
COMMISSION

Before WASHINGTON, DANAHER, AND BURGER, *Circuit
Judges*

JUDGMENT

This case came on to be heard on the record from the Federal Trade Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the order of the Federal Trade Commission on review in this case be, and it is hereby, set aside, and that this case be, and it is hereby, remanded to the Federal Trade Commission for further proceedings consistent with the opinion of this Court.

Dated: May 28, 1958.

Per Circuit Judge DANAHER.

Dissenting opinion by Circuit Judge WASHINGTON.

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JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No. 406

FEDERAL TRADE COMMISSION, *Petitioner*.

v.

SIMPLICITY PATTERN CO., INC.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR SIMPLICITY PATTERN COMPANY, INC.

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On Writ of Certiorari to the United States Court of Appeals
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BRIEF FOR SIMPLICITY PATTERN COMPANY, INC.

By reference, the Statement and Argument contained in Simplicity's brief in No. 447 are included herein. As noted there, both of these petitions present integral parts of the same basic question, and our argument on Simplicity's petition relates, as well, to the issues here.

The brief of the Federal Trade Commission misstates the holding of the Court of Appeals, offers an incomplete version of the legislative history, reads into one subsection the limitations of another while arguing the inappropriateness of such a construction, fails to give proper scope to subsection 2(b)'s "justification", and once more relies upon the subsection 2(c) cases which the Court of Appeals held "have no bearing whatsoever on our problem."

The Commission Misstates the Court of Appeals Holding

The Commission's brief contends that the Court of Appeals improvised a "cost justification defense [applicable to subsection 2(e)] much broader in scope than the limited defense expressly provided for in § 2(a)." The Court did not; if anything its "cost justification" is narrower in scope than the cost proviso of subsection 2(a). The latter permits "price differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery, resulting from the differing methods or quantities in which commodities to such purchasers were sold or delivered." The Court held Simplicity entitled to undertake justification "in terms of its cost of sale and delivery as relating to the different methods of sale and distribution by the two groups . . ." (R. 338)*

The Commission's Legislative History Is Incomplete

The legislative history with respect to cost justification is in no sense as crisp or simple as the Commission would make out. The meager quotations from the two Committee reports, which the Commission states "explained the meaning of the proviso entirely in terms of price differentials and nowhere suggested that it had any broader scope," (p. 14) are readily countered by statements from precisely the same sources, suggesting a *much* broader scope:

"The object of the bill . . . is to suppress more effectually discriminations between customers of

* The Commission's further contention that "cost justification" under 2(e) might be "promotive of monopoly" because not conditioned by the "quantity-limits" proviso of 2(a) is almost frivolous. No valid Commission order has ever been entered under that proviso. See *FTC v. B. F. Goodrich Co., et al.*, 242 F. 2d 31 (D.C. Cir. 1957). And to the extent that such a limitation might be significant in a 2(e) proceeding, we assume it *would* be applicable.

the same seller not supported by sound economic differences in their business positions or in the cost of serving them. Such discriminations are sometimes effected directly by price . . . and sometimes by separate allowances to favored customers for purported services." H. Rep. 2287, 74th Cong. 2d Sess., p. 7. See also Sen. Rep. 1502, 74th Cong. 2d Sess., p. 3.

"[The cost proviso] leaves trade and industry free from any restriction or impediment to the adoption and use of more economic processes of manufacture, methods of sale, and modes of delivery . . ." Id., p. 9. See also Sen. Rep. 1502, p. 5.

"Any physical economies that are to be found in mass buying and distribution . . . none of them are in the remotest degree disturbed by this bill. Nor does it in any way infringe the seller's freedom to give all or any part of the saving so effected to others with whom he deals . . ." Id., p. 17.

And this broad-gauge legislative motivation has been acknowledge by this Court *Automobile Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 73 (1953).

The Commission Itself Reads Limitations from One Subsection of the Act Into Another

The Commission's brief asserts the "structural independence of the several subsections of § 2" (p. 13) (although it concedes that they are "obviously closely related in basic purpose" (p. 12)) and urges that the limitations of one subsection are not to be read into another. Yet, the brief offers a graphic demonstration of the impossibility of completely insulating the various subsections of the act, by reading into subsection 2(d) the meeting competition defense of

subsection 2(b), which, on its face, is applicable *only* to subsections 2(a) and 2(e). While we do not challenge the correctness of the interpolation of 2(d) into 2(b), nor the enlightened policy considerations dictating an equation of 2(e) and 2(d), we point out that the proviso of 2(b) refers only to discriminations in "price" (2(a)) or in "the furnishing of services or facilities to any purchaser," (2(e)) but nowhere has reference to discriminations in "the payment of anything of value" to a purchaser for services or facilities furnished by him (2(d)). Clearly, as the Court of Appeals stated in *Elizabeth Arden v. Gus Blass*, these various subsections are "coordinate enumerations" to be construed in conformity with the "dominating general purpose" of the Act. 150 F. 2d 988, 992.*

**The Commission's Brief Fails to Give Proper Scope to
Subsection 2(b)'s "Justification"**

In an effort to counter Simplicity's primary contention that subsection 2(b)'s "justification" must be endowed with substantive content—including not only the right to "cost justify" but also the even more fundamental right to rebut a prima facie case under 2(e) by showing absence of competitive injury—the Commission asserts that the section is only "pro-

* In our brief in No. 447 we pointed out that the Courts have always read into 2(e) the "commerce" and "competition" requirements of 2(a). (Brief, p. 37). Another Court of Appeals has recently read into 2(e) the "selection-of-customers" proviso of 2(a), *Naifeh v. Ronson Art Metal Works*, 218 F. 2d 202 (10th Cir. 1954); and the Commission for many years has read the "like grade and quality" test of 2(a) into 2(e)'s companion, 2(d). *In the Matter of Golf Ball Mfrs. Assoc.*, 26 FTC 824, 851 (1938). See also *Atlanta Trading Corp. v. Federal Trade Commission*, 258 F. 2d 365 (2d Cir. 1958).

cedural" and does not "create substantive defenses", citing to a single sparse and inconclusive sentence of legislative history.* What we have urged from the outset is that "justification" *must* have substantive meaning and that it cannot be limited solely to the meeting competition defense unless the avowed legislative purposes of the Act are to be disregarded.

In the Robinson-Patman Act, "Congress was dealing with competition which it sought to protect." *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 249 (1951). But if evidence of cost justification is to be barred under a constricted reading of subsection 2(b) or, more fundamentally, if a seller cannot show absence of competitive injury under 2(b), then the Robinson-Patman Act is used as an instrument to disable competition.

* The Commission's brief argues that 2(b) as first reported in the House referred only to discrimination "in price" that it was amended on the floor of the House, apparently as an afterthought, to include discrimination in "services or facilities furnished," as well, and that it was "only when the meeting competition defense . . . was extended to discriminations in services and facilities that it became necessary to expand the burden of proof provision [in the first paragraph]." (Brief, pp. 18-20) But the Commission's reading of the legislative history is incomplete. At the time of the House debate referred to, the companion Robinson bill had already been passed in the Senate and *there* the equivalent provision at all times had referred to discriminations in services and facilities furnished as well as in price. 80 Cong. Rec. 6435. Presumably the amendments on the floor of the House were to conform the House bill to the Senate bill. Moreover, the tail-end technical structure of the proviso in no way suggests that Congress intended it to wag the first paragraph, which firmly establishes the availability of "justification" to rebut a *prima facie* case, then adds, "*provided, however*" that nothing therein will limit the availability of the meeting competition defense.

The meeting competition defense—which the Commission here concedes is available to a charge under 2(e)—is, in effect, matter in avoidance. It presumes competitive injury resulting from the seller's differential practices but defines conditions under which the seller may avoid legal liability. "Congress meant to permit the natural consequences to follow the seller's action [in meeting competition in good faith]." *Standard Oil Co. v. Federal Trade Commission* at 250. But it is inconceivable that Congress would *permit* "justification" in legal avoidance of the injurious consequences of discriminatory practices but would not permit "justification" showing, in the first instance, that there were *no* injurious consequences.

This Court has held that so far as antitrust prohibitions are concerned, "the critical fact is the impact of the particular practice upon competition, not the label it carries." *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 397 (1953). If subsection 2(b)'s "justification" cannot be interpreted realistically to include rebuttal evidence showing an absence of competitive injury, or evidence of cost justification, then the furnishing of differential services and facilities is placed under greater legal hazard than competitively equivalent price differentials, and "forms or nomenclature" rather than competitive "impact", become crucial.* Any such unreasoning result would clash with the most basic antitrust objectives.

* See Rowe, "How to Comply with Sections 2(e)-(f)" 1957 CCH Antitrust Law Symposium, 124, 131-136. See also Report of the Atty. Gen.'s Natl. Comm. to Study the Antitrust Laws, 191-2 (1955).

**The Commission Again Relies Upon Inapplicable
Subsection 2(c) Cases.**

Once again the Commission relies for legal support upon a series of Court decisions in subsection 2(c) cases. The Court of Appeals below held that those rulings "have no bearing whatsoever on our problem". Since we addressed ourselves fully to their inapplicability in our brief in No. 447, we do not belabor the point here.

CONCLUSION

The decision of the Court of Appeals so far as it holds a "cost justification" defense available to a charge under 2(e) must be sustained. Upon the grounds set forth in Simplicity's petition herein, No. 447, the order of the Federal Trade Commission must now be set aside and the proceedings dismissed.

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No. 408

In the Supreme Court of the United States

OCTOBER TERM, 1958

FEDERAL TRADE COMMISSION, PETITIONER

v.

SIMPLICITY PATTERN Co., Inc.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE FEDERAL TRADE COMMISSION

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BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 327-344) is reported in 258 F. 2d 673. The opinion of the Federal Trade Commission (R. 27-31) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1958 (R. 345). The time for filing a petition for a writ of certiorari was extended by Mr. Chief Justice Warren on August 28, 1958, to September 26, 1958 (R. 346). The petition was filed on September 26, 1958, and was granted on November 24, 1958 (R. 347; 358 U.S. 897). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the defense of "cost justification," which § 2(a) of the Clayton Act expressly provides is a defense to a charge of price discrimination under that section, is also available as a defense to a charge of discrimination in furnishing of services or facilities in violation of § 2(e) of the Act.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, is set forth in the appendix, *infra*, pp. 25-27.

STATEMENT

The Federal Trade Commission initiated this proceeding in June 1954 by issuing a complaint against respondent charging, in Count I, use of unfair methods of competition in violation of the Federal Trade Commission Act, and, in Count II, discrimination in favor of its "larger customers" by furnishing to them services or facilities not accorded on proportionally equal terms to its "smaller customers", in violation of § 2(e) of the Clayton Act (R. 2-10). Since the Commission subsequently dismissed Count I, the case now concerns only the order of the Commission based on the Clayton Act charge.

1. Respondent's business is the manufacture and sale of dress patterns, which are used for making women's and children's dresses in the home (R. 13). It sells its patterns to department stores, to five and ten cent stores (here called ten cent stores), and to relatively small stores engaged in sale of fabrics (here called

fabric stores) (R. 212-3). Four other companies sell dress patterns to retailers.¹ On a unit basis, respondent's sales exceed the combined sales of its competitors; on a dollar basis, they are about one-third of the industry total (R. 204-5, 233, 312).² It sells in the United States to about 17,200 retail outlets, which represent about 12,300 customers (R. 211).

Respondent's patterns are sold at retail at 25¢, 35¢, and 50¢, and are sold to retailers at 60% of the labeled retail price (R. 21). Respondent maintains about 600 current patterns, issuing some 40 new designs each month (R. 199, 236). Three times a year it sends its customers a list of its discarded designs and gives the dealer a credit for the discarded designs which the dealer has on hand (R. 236). Every month respondent issues a catalogue which includes the newly issued patterns and omits those withdrawn as outmoded, so that the number of patterns in the catalogue remains about constant (R. 199). The catalogue is essential to sale at retail (R. 22). A purchaser looks through the catalogue to select the pattern or patterns wanted and the sales clerk takes from stock the ones chosen (R. 58, 75, 136). Respondent also supplies to retailers (normally with the initial stock of patterns) steel cabinets specially designed for storing the patterns and displaying the catalogues (R. 202):

¹ Vogue, McCall, Butterick, and Advance Patterns (R. 58, 205).

² The smaller share of the business dollarwise is because respondent's patterns are among the lowest priced patterns (R. 233).

The fabric stores pay respondent \$2.00 or \$2.50 for each new catalogue; pay (by purchase or rental) for the cabinets; pay in full for their stocks of patterns;³ and pay the cost of transportation on all patterns, catalogues, and cabinets shipped from respondent (R. 37, 43-4, 83, 88, 127, 159-60, 234, 316). In sales to ten cent stores, respondent's practices are radically different: it furnishes catalogues and cabinets free; pays all transportation costs; and does not require payment for the patterns carried in stock (R. 62-3, 208).

The free services and facilities thus furnished ten cent store chains are substantial in value. As to four ten cent store chains, the catalogues which respondent furnished free in 1954 were valued at \$128,904; the cabinets furnished free which they had on hand at the end of 1954 were valued at over \$500,000; and their inventory of respondent's patterns at the end of 1954 was valued at more than \$1,775,000, each of these values being based on respondent's usual sales price.⁴ Respondent's president testified that it would cost over \$2,000,000 annually to give its other customers (representing about 75% of its sales, R. 312, 314) the free transportation, free catalogues, and free cabinets furnished to ten cent stores (R. 234, 235).⁵

Respondent's operations in selling to ten cent stores

³ Respondent permits some fabric stores to purchase patterns on credit, but charges them 5% interest on the amount owed (R. 275, 279, 280).

⁴ Totals (excluding Sears Roebuck) of columns b, g, and h, of Commission Ex. 44-B, R. 313, as explained at R. 315.

⁵ That figure does not include the cost of interest-free financing of inventories, a further benefit given the ten cent stores.

and to fabric stores are substantially the same, both in the distributive steps involved and in sales volume per retail outlet. Each individual store in a ten cent store chain orders and reorders patterns directly from respondent, and respondent ships the orders direct to the individual store. (R. 63, 73).⁶ Ten cent stores often have a lower sales volume per store than fabric stores. In the Washington, D.C. area, the 1954 sales of respondent's patterns by 33 ten cent stores were \$16,805, or \$509 per store, while the 1954 sales of 48 fabric stores were \$27,365, or \$570 per store (R. 212-3).⁷

Ten cent stores expect to make a profit on the sale of respondent's patterns and would not handle them if they did not independently return a profit (R. 22). Fabric stores, on the other hand, ordinarily make no profit, as the business is now conducted, on the sale of dress patterns (R. 23). They handle respondent's patterns, and frequently also patterns of its competitors, because many of their customers expect to look at patterns before purchasing fabrics for making clothing; availability of suitable patterns in the stores promotes their fabric sales (*ibid.*).

2. On respondent's motion to dismiss both counts of the complaint, made at the close of the Commission's evidence, the hearing examiner ruled that the evidence

⁶ Payment for patterns purchased by stores in the Woolworth chain is made from one of its 11 district offices (R. 73), but respondent, to verify these payments, would have to check them against the orders received from individual stores.

⁷ Respondent's president testified that the sales in the Washington area were substantially representative of respondent's national sales (R. 213-4).

showed a violation of § 2(e) of the Clayton Act, and denied the motion as to Count II (R. 292-3, 297). In a subsequent colloquy with counsel, the examiner stated that, as he construed the statute, the cost-saving proviso attached to the prohibition against price discrimination in § 2(a) did not apply to the prohibition in § 2(e) against discrimination in the furnishing of services and facilities, and that he would, upon objection, exclude any evidence offered by respondent to show "cost justification of the value of the services and facilities" furnished ten cent stores (R. 298, 302, 304-5). Respondent's counsel stated that, under these circumstances, respondent would offer no evidence (R. 305).

The examiner found that ten cent stores and fabric stores "are in competition in the sale of respondent's patterns"; that no showing of "competitive injury" was required; and that respondent had violated § 2(e) by furnishing free catalogues and cabinets to the ten cent stores but not to the fabric stores (R. 22-23). The Commission adopted the examiner's findings as its own (R. 31), and stated in its opinion that § 2(e) is not to be read as permitting "introduction of evidence relating to cost justification" (R. 30). The order which the Commission entered (adopting the order proposed by the examiner) requires respondent to cease and desist from furnishing any of its customers with catalogues, cabinets, or other facilities unless such facilities "are available on proportionally equal terms to all customers competing with such favored customers in the sale of respondent's patterns" (R. 25, 31).

The court of appeals upheld the Commission's findings that respondent had discriminated among its purchasers in the furnishing of services and facilities, and that the favored purchasers and those discriminated against competed with each other in the sale of respondent's patterns (R. 331-2). On the latter point the court said (R. 332):

We agree that the [ten cent stores] and the fabric stores, operating in the same cities and in the same shopping area, often side by side, were competitors, purchasing from Simplicity at the same price and then at like prices retailing the identical product to substantially the same segment of the public.

A majority of the court (Judges Danaher and Washington) also agreed with the Commission that "Section 2(e) was written for the promotion of fair dealing among the customers of a seller" and that injury to competition is not "an element of a § 2(e) violation" (R. 333).^{*} However, a different majority of the court (Judges Danaher and Burger) concluded that, under § 2(b) of the Act, a seller may "dispel" a § 2(e) charge by showing that its lower costs, in sales to the favored class of purchasers, equalled the value of the facilities or services furnished to them and denied to others (R. 333-6, 338-41). Accordingly, the court set aside the Commission's order and remanded the case for further proceedings for the receipt of respondent's "cost justification" evidence.

Judge Washington, dissenting, was of the view that the cost-justification defense is "available in a case

^{*} Judge Burger disagreed with this conclusion. See footnote 13 to the court's opinion (R. 339).

brought under Section 2(a), but not in one brought under Section 2(e)" (R. 344). He stated: "The 'justification' referred to in Section 2(b) must be that described in the meeting-competition proviso to that section, or such justification as may be spelled out from the provisions of the particular section—other than Section 2(b)—creating the offense alleged" (R. 343). He pointed out that no one claimed that the § 2(b) proviso was applicable to the present case; and that the only justification which § 2(e) itself permits is a showing by the seller "that in fact the facilities furnished were accorded to all purchasers on proportionally equal terms" (R. 343-4).

SUMMARY OF ARGUMENT

1. Section 2(e) of the Clayton Act forbids, without qualification, the furnishing of services or facilities to one purchaser "upon terms not accorded to all purchasers on proportionally equal terms." No exception is made to permit the furnishing of facilities the value of which does not exceed the seller's cost savings in sales to the favored purchaser, and no such "cost-justification" defense can be read into the terms of § 2(e). Section 2(a) of the Act, which forbids discrimination in price among purchasers, contains a proviso expressly authorizing price differentials when justified by cost differences, but it is clear, as the court of appeals held, that that proviso is applicable only to § 2(a) and does not qualify the absolute prohibitions of the other subsections of § 2.

The court of appeals, although agreeing that the § 2(a) proviso is inapplicable to § 2(e) and that

§ 2(e) itself, provides no exception for cost-justified discrimination, held that § 2(b) of the Act creates an independent defense of "justification" for any practices that might otherwise violate §§ 2(a), 2(d), or 2(e). Although recognizing that the Act nowhere defines "justification"—apart from the affirmative defenses expressly authorized in the substantive provisions of the section (and the proviso to § 2(b))—the court held the term was broad enough to include the defense that the discrimination reflected only cost savings in dealing with the favored purchaser.

That interpretation of § 2(b) is unsupportable. That section provides that upon proof being made of discrimination in price or services and facilities, "the burden of rebutting the prima-facie case thus made by showing justification shall be upon" the person charged with the violation. Patently the provision is no more than a procedural direction establishing the burden of proof on defenses otherwise recognized and does not itself create substantive defenses. *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 75.

That reading of § 2(b) is confirmed by its legislative history. In addition to its procedural provisions, § 2(b) contains a proviso permitting discrimination by a seller when necessary to meet competition. As originally reported, the proviso authorized only price discrimination in meeting competition. Likewise, the burden-of-proof provisions, as originally reported, applied only to proceedings involving discriminations in price, since at that time the only affirmative defenses provided for were those applicable to price

discrimination (the provisos to §§ 2(a) and 2(b)). On the floor of the House, however, the proviso to § 2(b) was amended so as to permit discrimination in services or facilities (as well as in price) in order to meet competition. The same amendment also modified the first part of § 2(b) to extend the burden-of-proof provision to cover cases involving discrimination in services or facilities. The whole amendment was explained to the House as simply permitting "a seller to meet * * * competition in services and facilities furnished" (80 Cong. Rec. 8225). That was clearly its only purpose, and the amendment to the procedural provisions did no more than recognize the new substantive defense to § 2(e) charges created by the amended proviso.

2. The decision below is also inconsistent with the uniform judicial construction of the several subsections of § 2 in analogous situations. While § 2(a) prohibits only those discriminations in price which may injure competition, the courts have uniformly held that no competitive injury need be proved to establish illegal discrimination in services or facilities in violation of § 2(e) (e.g., *Elizabeth Arden, Inc. v. FTC*, 156 F. 2d 132, 135 (C.A. 2), certiorari denied, 331 U.S. 806) or illegal brokerage fees in violation of § 2(c) (e.g., *Biddle Purchasing Co., v. FTC*, 96 F. 2d 687, 690 (C.A. 2), certiorari denied, 305 U.S. 634). There seems no relevant distinction in this respect between the competitive-injury limitation of § 2(a) and the cost-justification defense provided for in that section, and the reasons for not reading the former into the other subsections equally apply to the latter. The two

questions were, indeed, treated as identical in *Great Atlantic & Pacific Tea Co. v. FTC*, 106 F. 2d 667 (C.A. 3), holding that neither the competitive-injury limitation nor the cost-justification defense of § 2(a) are applicable to the prohibition of brokerage fees in § 2(c).

Nor is it anomalous to permit the seller's lower cost as a justification for price discrimination but not as a justification for discrimination in services or facilities. The distinction is justified in order to require variance in treatment of different purchasers to be brought out in the open, in the form of readily measurable price differentials, rather than be disguised in variations of services and facilities furnished.

ARGUMENT

I

IT IS CLEAR FROM THE FACE OF THE STATUTE AND ITS LEGISLATIVE HISTORY THAT COST JUSTIFICATION IS NOT A DEFENSE TO A CHARGE OF DISCRIMINATION IN FURNISHING SERVICES OR FACILITIES TO PURCHASERS IN VIOLATION OF SECTION 2(e) OF THE CLAYTON ACT

Section 2(e) of the Clayton Act makes it "unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale * * * by * * * the furnishing of, any services or facilities * * * upon terms not accorded to all purchasers on proportionally equal terms." It is clear, as the court below held, that respondent's furnishing of free catalogues and cabinets to ten cent stores but not to fabric stores constituted, prima facie at least, a violation of that section.

The question is whether "cost justification" is a defense to such an alleged violation—i.e., whether respondent may defend the charge against it by showing that the value of the services and facilities given the ten cent stores did not exceed its cost savings on sales to such stores. In terms, § 2(e) forbids all such discrimination, whether cost-justified or not, and it is our view that no such defense can be read into the section, whether by virtue of (1) the cost-justification proviso of § 2(a); (2) an interpretation of § 2(e) itself; or (3) by inference from the procedural provisions of § 2(b).

A. THE COST-JUSTIFICATION PROVISIO OF SECTION 2(B) IS
INAPPLICABLE TO SECTION 2(E)

Section 2(e) is one of four subsections of § 2 containing substantive prohibitions of selling practices: § 2(a) prohibits discrimination in price between different purchasers; § 2(c) prohibits payment of brokerage to a purchaser or his agent; § 2(d) prohibits payment to a customer for services or facilities furnished by him without making a proportionally equal payment available to other customers; and § 2(e) prohibits furnishing to a purchaser services or facilities not accorded to all other purchasers on proportionally equal terms.* While obviously closely related in basic purpose, each of these subsections sets forth

* Section 2(f), although also a substantive prohibition, merely outlaws the knowing receipt of a price discrimination the giving of which is otherwise prohibited by § 2(a). To that extent § 2(f) is necessarily subject to the defenses available under § 2(a). See *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 70-71.

a separate and distinct prohibition; each prohibition is independently defined and each definition contains different elements.

Section 2(a), in particular, is subject to limitations significantly absent from the other subsections. It prohibits price discrimination only "where the effect of such discrimination may be substantially" to injure competition. None of the other subsections is so qualified. In addition, a proviso to § 2(a) expressly provides that "nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered," subject, however, to the power of the Commission to establish quantity limits beyond which further differentials are not permitted. Again, the other subsections contain no equivalent provision.

From the structural independence of the several subsections of § 2, we think it clear, and the court of appeals agreed (R. 338), that the cost-justification proviso of § 2(a) provides a defense only to the prohibition contained in that subsection (price discrimination) and cannot apply, of its own force, to any of the other subsections. Respondent contended in the court below that the proviso was not limited in application to § 2(a) because it refers to justified "differentials" rather than to "price differentials." In its context, however—in a proviso to a prohibition of *price* discrimination—the meaning of "differential" is clear. The committee reports, moreover, ex-

plained the meaning of the proviso entirely in terms of price differentials and nowhere suggested that it had any broader scope. Thus the House Committee report stated that the proviso¹⁰ "limits the use of quantity price differentials to the sphere of actual cost differences", and that it "limits the differences in cost which may justify price differentials". H. Rep. 2287, 74th Cong., 2d Sess., pp. 9, 10. The Senate Committee report said that the proviso "limits the use of quantity price differences", and that it limits "the differences in cost which may be honored in support of price differentials". Sen. Rep. 1502, 74th Cong., 2d Sess., p. 5.

B. SECTION 2 (c) DOES NOT ITSELF IMPLICITLY EXEMPT COST-JUSTIFIED DISCRIMINATION

The specification of a cost-justification defense in § 2(a) and its omission from the other subsections of § 2 in itself precludes, we submit, finding such a limitation to be implicit in the other subsections. In any

¹⁰ The proviso, as reported by the House Judiciary Committee, read (H. Rep. 2287, 74th Cong., 2d Sess., p. 2):

That nothing herein contained shall prevent or require differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *

The proviso, as reported by the Senate Judiciary Committee, read (Sen. Rep. 1502, 74th Cong., 2d Sess. p. 1):

That nothing herein contained shall prevent * * * differentials which make only due allowance for differences in the cost, other than brokerage, of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *

event, there is no language in § 2(e) from which an exemption for cost-justified discrimination could be inferred. Distinguishing between purchasers on the basis of cost savings to the seller, furnishing facilities to some but not to others, cannot be said to be furnishing facilities "to all purchasers on proportionally equal terms." That phrase relates, not to equality in the seller's cost of sale, but to equality in the contribution made by the purchaser as an outlet for the seller's goods, measured by sales volume or some other uniform measure of his contribution. As the committee reports on the sections of the bill which corresponded to present §§ 2(d) and 2(e) explained (H. Rep. 2287, 74th Cong., 2d Sess., p. 16; Sen. Rep. 1502, 74th Cong., 2d Sess., p. 8):

The phrase "proportionally equal terms" is designed to prevent the limitation of such allowances to single customers on the ground that they alone can furnish the services or facilities or other consideration in the *quantities specified*. Where a competitor can furnish them in *less quantity*, but of the same relative value, he seems entitled, and this clause is designed to accord him, the right to a similar allowance commensurate with those facilities. [Emphasis supplied.]

Moreover, to interpret the "equal terms" requirement of § 2(e) as being satisfied if the discrimination is cost-justified would create a cost-justification defense to § 2(e) much broader in scope than that expressly provided for in § 2(a). In allowing cost-justification as a defense to § 2(a), Congress guarded against cost-justified differentials which would be

"unjustly discriminatory or promotive of monopoly" by empowering the Commission to establish quantity limits beyond which additional discounts may not be allowed (§ 2(a), second proviso). Were a cost-justification defense read into § 2(e), no such limitation would be applicable. Hence the limitation in § 2(a) on cost-justified price differentials could be avoided by granting further cost-justified preferences in the form of services or facilities rather than further price reductions.

C. A DEFENSE OF COST JUSTIFICATION CANNOT BE INFERRED FROM THE PROCEDURAL PROVISIONS OF SECTION 2(b)

In upholding respondent's claim to a cost-justification defense, the court of appeals relied neither upon the proviso to § 2(a) nor upon an interpretation of § 2(e) itself. Rather it found the existence of such a defense to be implicit in the procedural provisions of § 2(b). Section 2(b) provides in part:

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided,*
* * *

The proviso provides that a seller may rebut the prima facie case by showing that he offered the prices or furnished the services or facilities to meet those offered or furnished by a competitor.

The proviso to § 2(b) clearly creates a meeting-competition defense to §§ 2(d) and 2(e) as well as to § 2(a). Thus, in providing, in the first part of § 2(b), that the burden of proving affirmative defenses should be upon the defendant, it was necessary to refer to proceedings under those subsections (discrimination in services or facilities) as well as to proceedings under § 2(a) (discrimination in price), and the reference to § 2(e) proceedings in the first part of the section plainly has no other significance.

The court of appeals, however, interpreted the provision of § 2(b) requiring that "justification" be affirmatively shown as itself creating a substantive defense of "justification," in effect limiting the scope of §§ 2(a), 2(d), and 2(e) to only "unjustified" discrimination. Since, as the court of appeals recognized (R. 338), the Act in no way defines "justification," that interpretation leaves to the courts the evolution, on a case-by-case basis, of new standards of "justification" for conduct which would otherwise violate the provisions of § 2. In this case, the court held simply, without limiting the general scope of the defense of "justification," that it includes the giving of discriminatory advantages which do not exceed in value the seller's cost savings in selling to the favored purchaser.

That interpretation of § 2(b) is, we submit, untenable. On its face, the first portion of the section (i.e., before from the meeting-competition proviso) is, as this Court has observed, "procedural" and merely "attempts to lay down the rules of evidence

under the Act". *Automatic Canteen Co., v. FTC*, 346 U.S. 61, 75 and n. 17. In terms, it does no more than allocate the burden of proof for affirmative defenses elsewhere created and is simply declaratory of "the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45.

The court's interpretation of the first part of § 2(b) as creating a new substantive defense would also make the cost-justification proviso of § 2(a) surplusage and would, as noted above (pp. 15-16), afford a cost-justification defense to §§ 2(d) and 2(e) much broader in scope than the limited defense expressly provided for in § 2(a). Moreover, if § 2(b) were intended to give the courts a general warrant to exempt from the several prohibitions any conduct which they deem "justified," there seems little reason why § 2(b) should not have been extended to include proceedings under § 2(c) (brokerage payments). The explanation is simple, however, if § 2(b) is read as being only procedural: § 2(c) is the only one of the four substantive prohibitions to which no affirmative defense at all is expressly provided, making a provision for the burden of proof in such proceedings unnecessary.

Finally, the legislative history of § 2(b) shows conclusively that it was intended not to create substantive defenses (other than in the meeting-competition proviso) but only to prescribe the burden of proof for defenses otherwise authorized. In a 15-page discussion of the bill, the House Judiciary Committee report devoted but a single sentence to what became

§ 2(b)" (H. Rep. 2287, 74th Cong., 2d Sess., p. 16):

Section [(b)] down to the proviso merely lays down directions with reference to procedure including a statement with respect to burden of proof.

As thus reported, the section, both in its initial part and in the proviso, referred solely to "discrimination in price" (*id.* at p. 2). The section was expanded so as to include, in both parts, discrimination in furnishing services or facilities by a committee amendment proposed on the floor of the House. The amendment was adopted without debate after the following statement made by Congressman McLaughlin on behalf of the House Judiciary Committee (80 Cong. Rec. 8225):

Mr. Chairman, this is a committee amendment agreed to unanimously by the committee and was explained yesterday.¹² It simply allows a seller to meet not only competition in price of other competitors but also competition in services and facilities furnished.

This history clearly shows that the first part of § 2(b) was intended solely to allocate the burden of proof on defenses otherwise authorized. It was originally limited in application to § 2(a) proceedings because no such defenses were provided for in the other subsections.¹³ It was only when the meeting-

¹² Section 2(e) of the bill as reported.

¹³ During the preceding day's discussion of the bill, the committee's proposed amendment of the section was referred to and the text of the amendment was given (80 Cong. Rec. 8106, 8140), but we do not find that it was then "explained".

¹⁴ The absence of any burden-of-proof provision applicable to proceedings under §§ 2(d) and 2(e), prior to the extension of

competition defense in the § 2(b) proviso was extended to discriminations in furnishing services and facilities that it became necessary to expand the burden-of-proof provision to include such proceedings. The fact that the Committee amendment to include discrimination in services and facilities in § 2(b) was presented to Congress solely in terms of extending the meeting-competition defense to such discrimination shows that this was the only substantive change intended and is inconsistent with the view that the burden-of-proof rule declared in the section generates any substantive defense. Both from the language of § 2(b) and its history, therefore, it is clear that there is no basis for reading the first part of § 2(b) as itself creating a substantive defense.

II

THE DECISION BELOW IS INCONSISTENT WITH THE UNIFORM JUDICIAL CONSTRUCTION OF THE ACT

The holding below that cost saving is a defense to a charge of violation of § 2(e) is inconsistent with the uniform judicial construction of the provisions of § 2 in analogous situations. The prohibition of price discrimination in § 2(a) is subject not only to the defenses permitted by the § 2(a) provisos but also to the limitation that the discrimination tends to injure the meeting-competition defense to such cases, also reinforces the conclusion, urged above (pp. 12-16), that a cost-justification defense cannot be read into § 2(e) either from its own terms or by extension of the § 2(a) proviso. Had it been thought that cost-justification was a defense in § 2(e) proceedings, it would have been necessary to provide for the burden of proof in such cases even before the creation of the meeting-competition defense.

competition. No proviso and no such limitation are attached to the prohibitions of §§ 2(c), 2(d), and 2(e). It has been repeatedly held that the injury-to-competition limitation of § 2(a) is not to be read into either the § 2(c) prohibition¹⁴ or the § 2(e) prohibition.¹⁵ And the grounds which have led the courts so to hold are equally grounds for not reading into these prohibitions the § 2(a) provisos. Indeed, in *Great Atlantic & Pacific Tea Co. v. FTC*, 106 F. 2d 667 (C.A. 3), where the court held that neither the cost-saving proviso nor the injury-to-competition limitation of § 2(a) was to be read into the § 2(c) prohibition, the court treated the question of reading in the proviso as presenting the "precise question" presented by reading in the injury-to-competition limitation (*id.* at 676). The court summarized its conclusion, both as to the cost-saving proviso of § 2(a) and its injury-to-competition limitation, as follows (*id.* at 677):

In other words, paragraph (c) constitutes a specific prohibition of a specific act and the acts committed by the petitioner are within such prohibition. To read the words of paragraph (a) into paragraph (c) destroys the Congressional intent.

¹⁴ *Riddle Purchasing Co. v. FTC*, 96 F. 2d 687, 690 (C.A. 2), certiorari denied, 305 U.S. 634; *Oliver Bros., Inc. v. FTC*, 102 F. 2d 763, 766, 767 (C.A. 4); *Great Atlantic & Pacific Tea Co. v. FTC*, 106 F. 2d 667, 676-677 (C.A. 3), certiorari denied, 308 U.S. 625; *Webb-Crawford Co. v. FTC*, 109 F. 2d 263, 269 (C.A. 5), certiorari denied, 310 U.S. 638.

¹⁵ *Elizabeth Arden, Inc. v. FTC*, 156 F. 2d 132, 135 (C.A. 2), certiorari denied, 331 U.S. 806; *Corn Products Refining Co. v. FTC*, 144 F. 2d 211, 219 (C.A. 7), affirmed, 324 U.S. 726.

Oliver Bros., Inc. v. FTC, 102 F. 2d 763 (C.A. 4), aptly states the reasons for applying §§ 2(c), 2(d), and 2(e) as they are written, namely as outright prohibitions, and not as being subject to limitations or defenses incorporated into § 2(a). The court said (p. 767):

* * * three specific matters were forbidden as unfair trade practices by subsections (c), (d) and (e) * * *. It is perfectly clear that all three of these practices were forbidden because of their tendency to lessen competition and create monopoly, without regard to their effect in a particular case; and there is no reason to read into the sections forbidding them the limitations contained in section 2(a) having relation to price discrimination, which is an extremely difficult matter to deal with and is condemned as unfair only in those cases where it has an effect in suppressing competition or in tending to create monopoly. The forbidding of specific practices because of their tendency toward a general result, also forbidden, is familiar legislative practice; and no reason suggests itself why the limitations and provisions relating to one should be read into those relating to the other.

Nor is it anomalous to permit the seller's lower cost as a justification for price discrimination but not as a justification for discrimination in services or facilities. If the seller's cost of manufacture, sale, or delivery is lower in sales to a particular purchaser or purchasers by reason of differing quantities sold or differing methods of sale or delivery, it is appropriate

for him to translate his lower cost into a lower price. Then, if he is proceeded against under § 2(a), he can rebut the prima facie case of price discrimination by proving his lower cost. But paying brokerage to the buyer, or furnishing to him facilities not accorded in like measure to all other buyers, is discrimination cloaked as a legitimate business transaction. Congress denominated practices of this kind as "abuses,"¹⁶ and accordingly outlawed them. The outright prohibitions were designed to bring variance in treatment of different purchasers into the open, as price differentials, which could be proceeded against, if at all, under the carefully framed provisos and limitations of § 2(a). In *Biddle Purchasing Co. v. FTC*, 96 F. 2d 687, 692 (C.A. 2), the court said:

Congress may have had in mind that one of the principal evils inherent in the payment of brokerage fees by the seller to the buyer directly or through an intermediary, is the fact that this practice makes it possible for the seller to discriminate in price without seeming to do so. * * * One of the main objectives of section 2(c) was to force price discriminations out into the open where they would be subject to the scrutiny of those interested, particularly competing buyers.

¹⁶ The House Judiciary Committee report on the bill said that the subsection which is now 2(c) deals with "the abuse of the brokerage function" (H. Rep. 2287, 74th Cong., 2d Sess., p. 14), and the Conference Report on the bill states that the subsections which are now 2(d) and 2(e) deal with "the major types of abuses" in furnishing or paying for advertising, services, and facilities (H. Rep. 2951, 74th Cong., 2d Sess., p. 7).

CONCLUSION

It is respectfully submitted that the judgment of the court of appeals should be reversed, with directions to affirm the Federal Trade Commission's order.

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APPENDIX

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13:

(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on

account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prime-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or dis-

count in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) That it shall be lawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.